Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The former City Manager of the City of Concord, California sued the City and its former Mayor in federal District Court for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Title VII, which was amended by the Civil Rights Act of 1991 to permit trial by jury, excludes any "appointee on the policy making level" of a state or local government who is "not . . . subject to the civil service laws" from the definition of a covered "employee" entitled to bring a Title VII claim in federal court (the "Policymaker Exclusion"). Instead, the Civil Rights Act of 1991 directs that such Policymakers' discrimination claims be presented to the Equal Employment Opportunity Commission.

1. Is a Title VII claimant's status as an excluded Policymaker a question of law for the court, or a question of fact for the factfinder such that a federal jury trial would be required to determine whether the claimant had a right to jury trial in federal court?

2. Does a Title VII claimant's status as an excluded Policymaker divest the District Court of subject matter jurisdiction over the Policymaker's Title VII claims?

3. Did it violate the First Amendment to premise Title VII retaliation liability on nondefamatory public statements to the press by the Mayor and his supporters criticizing Plaintiff's official job performance, and on the City Council's failure to disagree with or censor that criticism as Plaintiff had demanded?

4. Did the City waive its First Amendment protections by acquiescing in a stipulation designed to effectuate the District Court's rulings against it on its motion in limine to exclude evidence and argument concerning the above-described criticism of Plaintiff on (among others) First Amendment grounds?

PARTIES TO THE PROCEEDING

1. City of Concord is the Petitioner here and was the Defendant below.

2. Neil S. Hardin is the Respondent here and was substituted as the Plaintiff in the Court of Appeals.

3. Byron Campbell was a Defendant in the District Court proceedings. Plaintiff's claims against Campbell were resolved prior to briefing in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

The City of Concord respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the Appendix at App. A1-A4. The opinions of the District Court are unreported and are reprinted in the Appendix at App. A5-A46, A48-A49.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 16, 1998. App. A1-A4. The Court of Appeals denied the City of Concord's timely Petition for Rehearing on December 7, 1998. App. A47. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the First Amendment to the United States Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*; and the Civil Rights Act of 1991, including the Government Employees Rights Act, 2 U.S.C. §§1201 *et seq.* Pertinent portions of the federal statutes involved are set forth verbatim in the Appendix at App. A94-A98. They include: 2 U.S.C. §§1202 and 1220, reprinted at App. A94-A95; 29 U.S.C. §630(f), reprinted at App.A96; and 42 U.S.C. §§2000e(f) and 2000e-5(f)(3), reprinted at App. A97-A98. Relevant portions of the California Government Code are reprinted in the Appendix at App.

A98-A99 and relevant portions of the Concord Municipal Code are reprinted in the Appendix at App. A99-A106.

STATEMENT OF THE CASE

A. Statement Of Facts.

Concord's municipal government. Concord, California, is a city of 114,000 located about 30 miles east of San Francisco. The City has a council-manager form of government that is common throughout the United States. 2A E. MCQUILLIN, MUNICIPAL CORPORATIONS §9.21 (3d ed. 1996) ("MCQUILLIN"). The citizens of Concord elect a five-member City Council that governs the City. CAL. GOV'T CODE §§36501, 36503. The Council is required to choose one of its members to serve as Mayor (*id.* §36801); the Mayor's authority is the same as the other Councilmembers', except that the Mayor presides at council meetings, and acts as the City's ceremonial head. *Id.* §§36802-03.

The Council appoints a City Manager, who is the chief executive officer responsible for managing the City's business. *Id.* §§34851, 34856; CONCORD MUN. CODE §§2206-08. Among other duties, the City Manager helps the Council fashion City policies, prepares the annual budget, and channels communication and direction from the City's political leaders to the hundreds of municipal employees serving the City's constituents. The City Manager "hold[s] office at the pleasure of the City Council," and can be removed from office in the Council's "uncontrolled discretion." CONCORD MUN. CODE §§2206(A), (B); *see also* CAL. GOV'T CODE §36506.

The election of Mayor Campbell, and the appointment of Plaintiff as City Manager. In November 1989, the City's voters elected Byron Campbell to a four-year term on the City Council; he was given the ceremonial position of Mayor for the next two years.

In 1990, the new Council appointed a new City Manager, Plaintiff Rita Hardin, on a 3-2 vote. Plaintiff

signed an at-will employment contract with the City and served as City Manager for the next 28 months. As illustrated by the closely divided vote that brought Plaintiff to her position, the City Council suffered profound political discord throughout Plaintiff's tenure. To make matters worse, Plaintiff and Campbell became entangled in what eventually became a very public power struggle over City administration, a struggle that eventually led to this lawsuit.

The sexual harassment allegations against Mayor Campbell. As City Manager, Plaintiff was responsible for investigating and responding to charges of sexual harassment of City employees. CONCORD MUN. CODE §§2208(A)-(C), (E), (K). Soon after Plaintiff became City Manager, she received reports that some female City staff were concerned about Campbell's inappropriately familiar behavior toward them. During the following year, Plaintiff took some steps to address this issue, but did not institute any investigation or other formal proceedings regarding the reports.

In October 1991, well over a year after Plaintiff's appointment, a former City intern filed formal harassment charges against Campbell. The City Council immediately hired an experienced harassment investigator, attorney Carol Stevens, to look into the charges. The following month, Campbell's two-year term as Mayor expired. He remained a member of the City Council until his four-year Council term expired in 1993.

The Stevens investigation quickly expanded to include other City employees' complaints. Plaintiff herself became one of the additional complainants, raising several incidents of inappropriately familiar touching that had occurred earlier in her tenure. After an extensive investigation, Stevens submitted a report to the City Council concluding that Campbell had indeed engaged in inappropriate conduct toward a number of City employees.

The City Council's censure and other remedial efforts. The Council promptly adopted a formal Resolution censuring Campbell, and imposing the strongest measures it

could to punish him and protect the City's employees from further harassment or retaliation. In addition to adopting the Resolution, every member of the City Council also publicly demanded Campbell's resignation. Campbell refused, calling the demands politically motivated.

In the months that followed, the public debate over the conduct of the City's affairs intensified. Campbell and Plaintiff both were often in the news. Numerous articles and letters to the editor appeared in local newspapers critical of Plaintiff's performance as City Manager. Plaintiff believed that Campbell was orchestrating these letters in retaliation for her role in his investigation and censure. She demanded that the other members of the City Council speak out in her support, and publicly praise her job performance. She also demanded that the Council investigate Campbell's role in the negative press coverage and letters to the editor, and put a stop to them. The Councilmembers declined to pry into the motives of the journalists or the letter-writers, or to try and stop the articles and letters critical of Plaintiff's job performance. They also declined to speak out on Plaintiff's behalf.

Plaintiff's resignation. Plaintiff abruptly left her job in September 1992, following a heated closed-session Council meeting in which she was criticized for mishandling the politically controversial appointment of a new City police chief. Plaintiff left the session and never returned to her job. A month later, she sent the City a letter of resignation blaming Campbell, and the City's failure to "protect" her from him, for the loss of her job.

B. Proceedings Below.

In April 1993, Plaintiff sued the City and Campbell in the United States District Court for the Northern District of California. She invoked the jurisdiction of the district court under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§2000e *et seq.*, and under 28 U.S.C. §1331 (general federal question jurisdiction) and §1367 (supplemental

jurisdiction). Against the City, Plaintiff's Complaint alleged sexual harassment, gender discrimination and retaliation in violation of Title VII and various state-law claims for discrimination, wrongful discharge, breach of contract, and misrepresentation. She asserted similar discrimination and retaliation claims against Campbell, as well as a defamation claim based on his public statements criticizing her job performance.

A five-week jury trial began in October 1994. The jury returned a verdict in favor of the City on all claims except her state-law claim for breach of the contractual covenant of good faith, as to which it awarded Plaintiff $75,000. In a separate verdict, the jury ruled in Campbell's favor on all the claims against him, including Plaintiff's defamation claim.

However, on Plaintiff's motion, the District Court overturned the verdict as against the weight of the evidence, and ordered a new trial on her claims for sexual harassment, retaliation and wrongful constructive discharge.[1] A second trial began in February 1996, and lasted seven weeks. The second jury returned a verdict against the City on all remaining claims, awarding $1,231,000 in damages. The jury also found Campbell liable for $65,000 in damages. Judgment was entered accordingly. App. A48. With attorneys' fees and costs, the judgment in Plaintiff's favor now stands in excess of $3.5 million.

After Defendants' post-trial motions were denied, Campbell and the City timely appealed the judgment to the United States Court of Appeals for the Ninth Circuit. Upon Plaintiff's death in February 1997, the Court of Appeals substituted her spouse, Neil Hardin, as appellee. Campbell settled Plaintiff's claims against him prior to briefing in the Court of Appeals, and is not a party to this Petition.

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[1]The District Court did not disturb the verdict in the City's favor on Plaintiff's other claims against it, or the verdict in Campbell's favor on Plaintiff's defamation claim. Plaintiff did not appeal those verdicts, and they are final.

The Ninth Circuit affirmed the judgment in a brief Memorandum Decision. App. A1. On the ground of waiver, it declined to address the merits of two key issues: (1) the District Court's lack of subject matter jurisdiction over Plaintiff's claims because of her status as "an appointee on the policy making level . . . [not] subject to the civil service laws of a State government" (42 U.S.C. §2000e(f)) (*see* Part I, *infra*); and (2) the judgment's improper premising of Title VII retaliation liability on speech and conduct protected by the First Amendment (*see* Part II, *infra*). The City's Petition for Rehearing and Suggestion for Rehearing En Banc was summarily denied. App. A47.

REASONS FOR GRANTING THE PETITION

This Petition raises important issues of federal law on which the lower federal courts are in conflict, each of which directly affects the democratic and political processes of state and local government.

The first of these questions concerns the scope, application and jurisdictional status of Title VII's "Policymaker Exclusion" (42 U.S.C. §2000e(f)) and parallel exclusions in several federal employment statutes. In 1991, Congress determined for the first time that high-level appointees of state and local governments ("Policymakers") would be protected by federal antidiscrimination law, but that their rights and remedies would be determined exclusively by a specialized administrative procedure before the EEOC, rather than by the federal jury trial available to most covered employees.

The Courts of Appeals have differed on whether a claimant's status as an excluded Policymaker is a question of law for the court or a question of fact for the factfinder. In this case, the Ninth Circuit concluded that the question was factual, and thus required a federal jury trial in order to determine whether the claimant had had a right to a federal

jury trial in the first place. Although the Tenth Circuit has ruled consistently with the Ninth (*see Anderson v. City of Albuquerque*, 690 F.2d 796, 800-01 (10th Cir. 1982)), three other Circuits disagree: The Sixth, Seventh, and Eighth Circuits all treat the applicability of the Policymaker Exclusion as a question of law to be decided by the court. *Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996); *Stillians v. Iowa*, 843 F.2d 276, 278-79 (8th Cir. 1988); *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983). *See* Part I(A), *infra*.

The Courts of Appeals also have split on whether a Policymaker's excluded status can be waived, and thus implicitly on whether the Policymaker Exclusion deprives the District Courts of jurisdiction. This is important, because it is integral to the remedial scheme Congress constructed in the Civil Rights Act of 1991, and because it determines whether any state-law claims of local government appointees at the policymaking level are tried in state or federal court. In this case, the Ninth Circuit concluded that the City had waived Plaintiff's status as an excluded Policymaker by not presenting the question to the jury, and thus implicitly held that the issue is not jurisdictional. Conversely, the Eighth and Sixth Circuits hold that the Policymaker Exclusion determines the District Court's subject matter jurisdiction to hear the case. *Stillians*, 843 F.2d at 278; *EEOC v. Board of Trustees*, 723 F.2d at 510. The Seventh Circuit, like the Ninth, has held the Exclusion can be waived. *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (7th Cir. 1994). *See* Part I(B), *infra*.

The second set of issues this Petition raises concerns the extent to which Title VII retaliation liability may be premised on speech and conduct protected by the First Amendment. A significant part of Plaintiff's case assigned liability to the City for Councilman Campbell's and his supporters' allegedly retaliatory nondefamatory public criticisms of Plaintiff's official job performance in the local press, and for the allegedly retaliatory failures by the remaining

members of the City Council to criticize Campbell and support Plaintiff, or to censor Plaintiff's public critics. *See* Part II(A), *infra*. This important issue concerning the scope of the First Amendment's protections of public debate on matters of public concern arising in a public workplace has prompted calls from courts and commentators for the Court's guidance. *See* Part II(C), *infra*. Yet the Ninth Circuit refused to consider this question as well, asserting that the City had waived it by acquiescing in a stipulation designed to effectuate the District Court's rulings against it on its motion in limine to exclude this evidence. That ruling was simply wrong, and an abdication of the Court of Appeals' constitutional responsibility to scrutinize the record with especial vigilance when liability is imposed on potentially protected speech or conduct. *See* Part II(B), *infra*.

The Petition should be granted on each of these issues, either for the Court's resolution after full briefing, or for summary vacatur and remand with directions that the Ninth Circuit consider the issues it unjustifiably failed to decide.

I.

THERE IS A SPLIT IN THE CIRCUITS CONCERNING APPLICATION OF THE POLICYMAKER EXCLUSION TO TITLE VII.

The City argued throughout this case that the District Court lacked subject matter jurisdiction because Plaintiff's position as City Manager fell within the "Policymaker Exclusion." The District Court determined that Plaintiff's position fell outside the Policymaker Exclusion. On appeal, the City claimed that this was error. Without even acknowledging the City's contention that the question was jurisdictional, the Ninth Circuit held (1) that the question of Plaintiff's exclusion from Title VII coverage was a *factual* issue for the *jury* to resolve; and (2) that the City had waived the issue by failing to present it to the jury in either trial, and by failing to make a motion for judgment as a matter of law

at the conclusion of the second trial as it had at the conclusion of the first. App. A2.[2]

The Ninth Circuit's ruling raises serious and important legal issues on two distinct questions on which the Circuits are split (*see* Parts I(A) and (B), *infra*), and was plainly incorrect (*see* Part I(C)), *infra*).

A. The Circuits Are Split On Whether The Applicability of The Policymaker Exclusion Is A Question Of Fact For The Jury Or Of Law For The Court.

Title VII originally excluded discrimination claims against state and local governments altogether. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). When Congress amended the statute in 1972 to permit actions against state and local governments, it also excluded from Title VII's definition of an "employee" covered by the statute certain elected and appointed government officials, including "appointee[s] on the policy making level" who are not "subject to the civil service laws of a state government."[3] "In exempting policy-making appointees, Congress realized the

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[2]The Ninth Circuit's entire discussion on the issue was this:

"When the district court denied the City's motion for summary judgment, the question of whether Hardin was exempt from Title VII's coverage remained an issue for the jury. The City failed to present the issue to the jury in either of its trials or to renew its motion for judgment as a matter of law at the second trial. This court lacks authority to consider the motion for judgment as a matter of law." (App. A2 (citing *Desrosiers v. Flight Int'l, Inc.*, 156 F.3d 952 (9th Cir. 1998), *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963)))

[3]*See* Pub. L. 92-261 §2(1), 86 Stat. 103 (codified at 42 U.S.C. §2000e(a)) (term "person" includes government); Pub. L. 92-261 §2(5), 86 Stat. 103 (codified at 42 U.S.C. §2000e(f)) (excluding from term "employee" "an appointee on the policy making level" who is not "subject to the civil services laws . . . .").

necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies." *EEOC Dec.* 79-08, 1978 EEOC LEXIS 25, at *2-*3 (Oct. 20, 1978).

The 1991 Civil Rights Act amended Title VII to provide litigants, for the first time, with a right to jury trial. Pub. L. 102-166 §102(c), 105 Stat. 1071, 1073 (codified at 42 U.S.C. §1981a). As part of the same legislation, Congress enacted the Government Employee Rights Act of 1991 ("GERA"), which provides appointed state and local policymakers excluded from coverage under Title VII the same substantive protections from discrimination provided for in Title VII.[4] But GERA does not grant those policymakers the right to a jury trial—or even the right to seek relief in federal court—that is provided to employees directly protected by Title VII. Instead, GERA specifies that policymakers may seek relief only from the EEOC, with judicial review (for abuse of discretion) by the Courts of Appeals. Pub. L. No. 102-166 §321, 105 Stat. 1071, 1097-98 (codified at 2 U.S.C. §§1220(b)-(d)); *compare* 42 U.S.C. §2000e-5(f)(3) *with* 2 U.S.C. §§1220(b)-(d).

The assignment of policymaking appointees' employment discrimination claims to a specialized administrative agency rather than to jury determination in a District Court reflects a legislative judgment regarding the appropriate procedure, factfinder and forum when claims of employment discrimination brought by high-level appointees may intrude upon a government's political or policymaking functions.[5]

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[4]Pub. L. No. 102-166 §§302 and 321 (later redesignated as §304), 105 Stat. 1071, 1088, 1097-98 (codified at 2 U.S.C. §§1202; 1220(a)). Initially, GERA also provided protection for Senate employees. Pub. L. No. 102-166 §§303-319, 324-325, 105 Stat. 1071, 1088-1099. That aspect of the statute was later repealed. *See* former 2 U.S.C. §§1203-1218, repealed by Pub. L. 104-1, §504(a)(2), 109 Stat. 41.

[5]*See* H.R. Rep. No. 102-40(I), at 155-56 (1991) (comparison of H.R. 1395 to the 1991 Civil Rights Act states that GERA does not permit Congressional employees to file Title VII lawsuits in federal court); 137

(continued . . .)

Thus, in holding that Plaintiff's status as a Policymaker was a factual question that the City was obligated to present to the jury on pain of waiver, the Ninth Circuit turned the statutory scheme on its head. In the Ninth Circuit's view, a defendant who claims the plaintiff is within the Policymaker Exclusion must submit to a jury the question of whether the plaintiff is entitled to a jury trial in District Court or should have presented the claims to the EEOC.

The lower courts are split on this issue. The Ninth Circuit's decision conflicts with the decisions of the Sixth, Seventh and Eighth Circuits, which have treated the applicability of the Policymaker Exclusion of Title VII and the identically worded provision in the Age Discrimination In Employment Act ("ADEA")[6] as a question of law, determining whether the individual claimant before them is an "appointee on the policy making level" solely by reference to the governing statutes and official job descriptions defining the claimant's position, without regard to whether the individual in question actually makes policy.[7]

(. . . continued)
CONG. REC. S17427-01 (Nov. 21, 1991) (comments of Sen. Nickles) (explaining rejected amendments to GERA that would have made the Senate subject to jury trials in employment discrimination cases).

[6]The Courts of Appeals have uniformly held that the Policymaker Exclusion in Title VII and the identically worded exclusion in the ADEA, 29 U.S.C. §630(f), should be construed and applied identically. *See, e.g., Tranello v. Frey*, 962 F.2d 244, 249 (2d Cir. 1992); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990); *EEOC v. Reno*, 758 F.2d 581, 583-84 (11th Cir. 1985).

[7]*Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996) (determining Policymaker status under Title VII and ADEA on basis of statutory duties because court "must look to the 'powers inherent in a given office, rather than the actual functions the occupant of that office performed'" (citations omitted)); *Stillians*, 843 F.2d at 278-79 (facial interpretation of state law used to determine plaintiff's policymaking authority in applying ADEA's Policymaker Exclusion); *EEOC v. Board Of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983) (official job description determines whether plaintiff is Policymaker under Title VII's Exclusion). *See also Stitz v. City of Eureka Springs*, 9 F. Supp. 2d 1046, 1053-54 (W.D. Ark. 1998) (because state law conferred policymaking duties upon

(continued . . .)

On the other hand, the Ninth Circuit's decision is consistent with the decisions of the Tenth Circuit and of several District Courts, which have held a plaintiff's "Policymaker" status to be a factual determination.[8]

The Ninth Circuit's decision also conflicts with decisions of the Eleventh Circuit and other Ninth Circuit panels that determine application of the comparable "personal staff" exclusion in Title VII and the ADEA[9] as a matter of law by reference to the position's defining statutes and job descriptions, rather than by examining the factual incidents of each particular employment situation.[10]

(. . . continued)
plaintiff, she was an excluded Policymaker under Title VII despite her allegations that, as a matter of fact, she was not permitted to make policy); *Butler v. New York State Dep't of Law*, 998 F. Supp. 336, 345-46 (S.D.N.Y. 1998) (Policymaker Exclusion determined from official job description or statutory description); *Lee v. Wojnaroski*, 751 F. Supp. 58, 60 (W.D. Pa. 1990) (under ADEA, court examines "statutory powers of the [plaintiff] to determine whether the post is a policymaking one. The performance or lack of performance by any given office-holder of policymaking functions is irrelevant to that determination").

[8]*Anderson v. City of Albuquerque*, 690 F.2d 796, 800-801 (10th Cir. 1982) (question of fact whether plaintiff made policy); *Schallop v. New York State Dep't of Law*, 20 F. Supp. 2d 384, 398-99 (N.D.N.Y. 1998) (examining facts to determine applicability of Policymaker Exclusion under Title VII); *Brown v. Polk County*, 811 F. Supp. 432, 437-38 (S.D. Iowa 1992) (same); *Patrick v. City of Florala*, 793 F. Supp. 301, 305 (M.D. Ala. 1992) (noting "highly factual" nature of policymaker inquiry under Title VII). Prior to 1991, questions of fact were decided by the court in Title VII cases. The more recent cases apparently did not consider the effect of the Civil Rights Act of 1991, which for the first time mandated a jury as the factfinder in Title VII cases.

[9]Under Title VII and the ADEA, a covered "employee" does not include "any person chosen by [an elected] officer to be on such officer's personal staff." 42 U.S.C. §2000e(f); 29 U.S.C. §630(f).

[10]*EEOC v. Reno*, 758 F.2d at 583 (facial reading of state law used to determine application of ADEA exclusion); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (examining statutes to determine whether plaintiff fell within the ADEA exclusion); *Ramirez v. San Mateo County*, 639 F.2d 509, 511-13 (9th Cir. 1981) (examining state and local statutes to determine whether deputy attorney general fell within Title VII exclusion).

Conversely, the Fifth Circuit holds the application of the person staff exclusion to be factual.[11]

The decisions treating the applicability of the Policymaker Exclusion and similar exclusions as an issue of law to be determined based on the governing statute and official job description rather than on a factual inquiry regarding the claimant's actual practices in each case make the most practical sense, and best accord with the statutory language at issue. As the Court observed in construing the Policymaker Exclusion in the ADEA:

> "[I]t is far from plain that the statutory exception requires that [the employee in question] actually make policy. The statute refers to 'appointees on the policy making level,' not to 'appointees who make policy.' It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance." (*Gregory v. Ashcroft*, 501 U.S. 452, 466-67 (1991))

Whether the subsisting confusion in the federal courts has resulted from inattention to the statute's literal wording or a deeper misunderstanding of the statutory scheme, however, the confusion is real and widespread. The Court should grant certiorari to settle the issue of whether the applicability of the Policymaker Exclusion under Title VII, and similar exclusions under other federal employment discrimination statutes, is a question of law to be resolved by the District Court or a question of fact to be determined by a jury.

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[11] *See Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986); *Teneyuca v. Bexar*, 767 F.2d 148, 152 (5th Cir. 1985); *Calderon v. Martin County*, 639 F.2d 271, 273 (5th Cir. 1981).

B. There Is A Conflict Among The Circuits Over Whether The Policymaker Exclusion Is Jurisdictional Or Can Be Waived.

That Congress intended the Policymaker Exclusion to be jurisdictional is evident from the history and structure of the statutory scheme it created. As we have seen, Title VII provides the federal District Courts with jurisdiction to entertain covered employee's claims, but excludes Policymakers from its definition of a covered "employee." 42 U.S.C. §2000e(f). GERA separately extends Title VII's substantive rights against discrimination to policymakers excluded from Title VII, but expressly establishes a distinct forum and procedure to adjudicate and enforce those rights: a specialized administrative determination by the EEOC, reviewable in the Courts of Appeals. "[C]ongressional preclusion of judicial review [to a certain class of plaintiffs] is in effect jurisdictional . . . ." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984) (holding that a statute that permitted milk handlers but not consumers to challenge administration's establishment of milk prices deprived the court of jurisdiction over consumers' claims).

The Ninth Circuit's terse disposition of the City's appeal on grounds of waiver did not even respond to the City's argument that the Policymaker Exclusion is jurisdictional. *See* AOB 19, 22 n.13, Reply 13. Nor was the Ninth Circuit the first Court of Appeals to have found the Exclusion subject to waiver: The Seventh Circuit came to the same conclusion in *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (1994). Surely neither of these Courts could have questioned the well-settled rule that a federal court's jurisdiction *must* be examined at all stages of the proceedings and can *never* be waived. The rule that federal courts have no authority in the absence of subject matter jurisdiction is so fundamental that "federal courts are under an independent obligation to examine their own jurisdiction," even when no party has raised the issue. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *see also* FED. R. CIV. P. 12(h)(3). Because "no

action of the parties can confer subject-matter jurisdiction upon a federal court . . . the consent of the parties is irrelevant, . . . [p]rinciples of estoppel do not apply, . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982) (citations omitted). And a plaintiff's statutory standing to bring suit is precisely the type of jurisdictional question that can and must be raised at any time—even *sua sponte* by an appellate court. *FW/PBS*, 493 U.S. at 230-31.

The Ninth and Seventh Circuits thus must have concluded that a claimant's Policymaker status was not jurisdictional. But those rulings conflict with published decisions of the Sixth and Eighth Circuits finding the District Courts without subject matter jurisdiction to consider an excluded Policymaker's claims.[12] It likewise conflicts with decisions of the Fifth and Eleventh Circuits, and other Ninth Circuit panels, according jurisdictional force to Title VII's and the ADEA's "personal staff" exclusions.[13] The Court should grant certiorari to resolve the conflict as to whether these statutory limitations on employees' standing are non-waivable limitations on the federal District Courts' subject matter jurisdiction.

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[12] *Stillians*, 843 F.2d at 278 (ADEA's Policymaker Exclusion is jurisdictional; jurisdiction issue raised *sua sponte* by Court of Appeals); *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983) (affirming the District Court's dismissal of a Policymaker's Title VII claim for lack of subject matter jurisdiction, without expressly discussing the jurisdictional issue).

[13] *EEOC v. Reno*, 758 F.2d 581, 583 n.6 (11th Cir. 1985) (affirming dismissal of ADEA claim for lack of subject matter jurisdiction under the "personal staff" exclusion); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (same); *Clark v. Tarrant County*, 798 F.2d 736, 748 (5th Cir. 1986) (acknowledging that Title VII's personal staff exclusion is jurisdictional).

C. The Decisions Of The Courts Below Are Clearly Erroneous.

Even if the applicability of the Policymaker Exclusion generally were a question of fact, and even if it were not a jurisdictional issue that cannot be waived, the Ninth Circuit's finding of waiver in this case was plainly wrong and precluded appellate review of an important question of federal law on which the District Court made an erroneous ruling with profound consequences for state and local governments.

The City initially raised Plaintiff's status as an excluded Policymaker, and the District Court's corresponding lack of jurisdiction, in a motion for summary judgment. The City's motion showed that Plaintiff's position satisfied both of the elements of the Exclusion: (1) Plaintiff was an "appointee on the policy making level"; and (2) she was not "subject to the civil service laws of a State government." 42 U.S.C. §2000e(f).

In denying the City's motion, the District Court made binding determinations as a matter of law on each of the two elements of the Policymaker Exclusion; as to neither element did it find any triable issue of material fact. App. A36-A38. On the first element, the District Court made an explicit finding that "[b]ecause Hardin exercised significant policymaking functions as City Manager, the Court finds that she was 'an appointee on the policymaking level' under Title VII." App. A36.[14] The District Court nonetheless denied the City's motion because it found from a facial reading of City ordinances that Plaintiff was "subject to . . . civil service laws" within the meaning of the Policymaker Exclusion. The Court reasoned that because Plaintiff's rights to such benefits as sick leave and vacation time were defined

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[14]In this the District Court was undoubtedly right. As is typical in the "city-manager" form of government Concord has adopted, the City Manager is the "administrative head of the City government"—in effect its Chief Executive Officer—who controls all city departments subject to City Council approval. CONCORD MUN. CODE §2208.

by reference to those portions of the City's laws that governed those benefits for civil service personnel, her position was subject to *some* of the City's "civil service laws," and thus outside the scope of the Policymaker Exclusion. App. A36.

The District Court's interpretation of Title VII was flatly wrong as a matter of law. An employee's status as an excluded Policymaker under Title VII "is, of course, a question of federal law, but we must look to state law" to determine whether the employee is subject to state civil service laws. *Stillians*, 843 F.2d at 279. The hallmarks of a civil service system are strong assurances of tenure, with limitations on discipline and termination; such protections typically are not extended to high-level political and policymaking appointees so that they may remain answerable to the political offices that appointed them. *Placer County Employees Ass'n v. Board of Supervisors*, 233 Cal. App. 2d 555, 558 (1965); 3 MCQUILLIN §§12.55, 12.76. As is true in thousands of municipalities throughout California and the nation, by law Concord's City Manager "hold[s] office at the pleasure of the City Council," and may be removed by the Council in the "exercise [of] its uncontrolled discretion." CAL. GOV'T CODE §36506; CONCORD MUN. CODE §2206(A), (B). Plaintiff's employment contract expressly incorporated these removal provisions. California's and the City's statutory scheme exemplifies the practically universal division prevailing under state and local law between "civil service" and "exempt" employees (*see, e.g.*, *Seidler v. Municipal Court*, 12 Cal. App. 4th 1229, 1237-38 (1993); 3 MCQUILLIN §12.76), and places the City Manager in the "exempt" category. CONCORD MUN. CODE §11304(a)(2)(2.1).[15] Indeed,

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[15]Concord's personnel system is divided into "Competitive Service" civil service positions, which are tenured upon completion of the probationary period and terminable only for specified reasons (CONCORD MUN. CODE §§11306-09); and "Exempt Service," which by its literal

(continued . . .)

the City Manager's "exempt" status is itself sufficient as a matter of law to establish that the position is not "subject to civil . . . service laws" for purposes of Title VII's Policymaker Exclusion. *Stillians*, 843 F.2d at 278.

The City unsuccessfully sought reconsideration of the District Court's erroneous decision that the City Manager was covered by the civil service laws. It later brought a motion for judgment as a matter of law on the same ground after the first trial (ER 435-39), which the District Court denied as "the same old argument" and "a motion for reconsideration, about the fourth." App. A23.

The District Court's ruling that Plaintiff was subject to civil service laws and outside the Policymaker Exclusion thus disposed of that issue for the duration of the trial court proceedings. FED. R. CIV. P. 56(d) (if the court does not resolve the entire action on a summary judgment motion, it "*shall* . . . make an order specifying the facts that appear without substantial controversy. . . . Upon the trial of the action the facts so specified shall be *deemed established*, and *the trial shall be conducted accordingly*") (emphasis added)); *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 747-48 (1st Cir. 1995) (court's finding in order *denying* summary judgment constituted Rule 56(d) order resolving issue for the duration of the case). After the District Court overturned the jury's verdict in the City's favor, a pretrial order carried into

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(. . . continued)
terms is exempt from civil service restrictions (*id.* §11304). However, the benefits provisions on which the District Court improperly relied to find that Plaintiff was "subject to . . . civil service laws" *are not civil service laws at all*. The Court relied (App. A38) on a provision that subjects the City Manager to "[P]ersonnel Policy and Procedure Statements" and Council resolutions dealing with incidental personnel matters, such as benefits. CONCORD MUN. CODE §11304(b). But it is the "Personnel *Rules*"—*not* the Personnel *Policy Statements* to which the City Manager is subject—that govern "the *civil service status* of employees," including discipline, layoff and termination (*id.* §11205(a) (emphasis added))—and the Personnel *Rules* do *not* apply to "exempt" employees such as the City Manager. *Id.* §11304(b).

the second trial all its orders and rulings from the first. ER 542.[16]

On this record, it is impossible to understand how the Ninth Circuit could have found a failure to preserve the Policymaker Exclusion issue. The District Court treated the question as one of law, on undisputed facts, and definitively resolved it in ruling on the City's motion for summary judgment. Under Rule 56(d), this was therefore not a case in which the City *could* have presented the issue to the jury at trial; the issue therefore cannot have been waived by a failure to do so.[17]

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[16]The City continued to challenge the District Court's jurisdiction during the second trial. *See, e.g.*, ER 1719 Dkt. 524 at 2 (Joint Pretrial Statement: The City "disputes that this Court has subject matter jurisdiction"); ER 1719 Dkt. 519 at 10 (The City's Statement of Disputed Facts and Points of Law: Applicability of Policymaker Exclusion is a disputed point *of law*); ER 1719 Dkt. 522 at 18 (The City's Trial Brief: "This Court has no jurisdiction over Plaintiff's Title VII claims" due to the Policymaker Exclusion).

[17]The authorities the Ninth Circuit cited to justify its abdication on the issue are inapposite. Those authorities quite correctly decline to review a pretrial ruling on an issue after a trial on the merits has superseded the pretrial ruling and fully resolved the same issue. *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 n.1 (9th Cir. 1992) "adhere[d] to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits." But to the extent any factual questions were involved here, the District Court's Rule 56(d) findings definitively resolved them, and did *not* "determine[] that issues of fact had to be tried." *Basciano v. Reinecke*, 313 F.2d 542 (2d Cir. 1963) held that denial of a Rule 50(b) motion made after a first trial was not reviewable after a second because "plaintiff's alleged failure to put in a technically sufficient case in the first trial" should not bar his recovery because "we now know, as a result of the second trial, that his cause of action is a valid one." *Id.* at 543. Here, the Court's ruling on Plaintiff's civil service status was a legal holding that could not change based on either party's presentation in the second trial, and was made applicable to the second trial by the District Court's pretrial order. ER 542. Finally, in *Desrosiers v. Flight International, Inc.* 156 F.3d 952, 957 (9th Cir. 1998) the appellants had never brought a Rule 50 motion at all, which is not the case here.

D. Applicability Of The Policymaker Exclusion Raises Important Questions Of Federal Law Affecting State And Local Governments Nationwide.

The questions this Petition presents are not only of great practical import to the thousands of state and municipal employers nationwide, but address the delicate balance that Congress struck when it calibrated the nature and degree of the federal antidiscrimination policy's intrusion into the political and policymaking processes of state and local government. As this Court has recognized, "non-elective executive . . . officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Gregory*, 501 U.S. at 462 (citation omitted). The Policymaker Exclusion ensures that federal juries are not invited to second-guess the motives of state and local elected officials in hiring or firing their top policymaking appointees, and that federal courts do not rule on delicate political issues concerning the appointment decisions of state and local elected officials. This case is a cautionary tale of how difficult it can be for juries to distinguish the political from the unlawfully retaliatory in such policy-laden decisions: one jury found no Title VII liability at all, while a second assessed seven-figure damages for the same conduct.

As discussed above, the Ninth Circuit's erroneous decision that Plaintiff's policymaker status should have been decided by the jury, and that the City waived this jurisdictional challenge by failing to present it to that jury, highlights subsisting conflicts among the Courts of Appeal on these questions. The issues are of vital importance. If the Policymaker and similar exclusions do go to the federal courts' subject matter jurisdiction, then a dismissal under the Policymaker Exclusion deprives the federal courts of jurisdiction over any remaining state-law claims, allowing state courts to decide issues of critical importance under state law about state and local policymakers. 28 U.S.C. §1367; *Randolph v. Budget*

Rent-A-Car, 97 F.3d 319, 327 (9th Cir. 1996). Conversely, if these exclusions are considered both factual and non-jurisdictional, as the Ninth Circuit held in this case, it will vitiate Congress's carefully considered remedial scheme, including its direction that delicate political decisions concerning high-ranking state and local policymakers *not* be decided by lay juries in federal courts. The issues raised in this Petition are eminently worthy of this Court's attention. The Petition should be granted for plenary briefing and decision on the merits.

Alternatively, the Court should grant certiorari, and summarily vacate and remand to the Ninth Circuit with directions to consider and decide the issue of whether Plaintiff is within the Policyholder Exclusion. Summary reversal is particularly appropriate when federal subject matter jurisdiction is lacking (*see United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *Lee v. Thorton*, 420 U.S. 139 (1975) (direct appeal under Tucker Act); *Richardson v. Morris*, 409 U.S. 464 (1973) (same); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (same)), and is particularly appropriate here. It appears that the Ninth Circuit completely overlooked both the nonfactual and the jurisdictional nature of the City's claim that Plaintiff was an excluded Policymaker—undeniably "pertinent matters which it appears that the lower court may not have considered." *See Stutson v. United States*, 516 U.S. 193, 194 (1996). *See also Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (the Court does not hesitate to reverse and remand for further consideration "where the lower court's order shows no sign of having applied the precedents that were briefed").

Moreover, even if that issue were not a jurisdictional one, the Ninth Circuit also plainly erred in holding that the City had failed to raise and preserve Plaintiff's status as an excluded Policymaker. It erroneously let stand a District Court ruling on an issue of considerable importance to state and local government. That ruling effectively eliminates the

Policymaker Exclusion for most high-ranking officials in state and local government. Most of those officials receive incidental benefits such as sick leave, vacation time and insurance, and many receive them on the terms defined for tenured civil servants. Yet few if any state or local governments consider their administrative heads part of the civil service despite the receipt of routine benefits, and most make the distinction—as the City of Concord does—between civil service and exempt employees, placing their top administrators in the exempt category. The ruling below therefore eviscerates the Policymaker Exclusion, and frustrates Congress's carefully constructed remedial scheme. The Ninth Circuit's refusal to address the merits of the Policymaker question was an error that the Court could and should correct by a summary disposition of this Petition.

II.

THE IMPOSITION OF TITLE VII LIABILITY FOR EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

The First Amendment precludes civil liability on any theory for "public debate about public figures" not involving false statements of fact. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53, 56 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Yet the District Court in this case permitted Plaintiff to persuade the jury to award seven-figure damages based on the Defendants' political speech and conduct concerning a public official on matters of public concern—activities that "ha[ve] always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). The District Court should never have allowed Title VII's salutary goal of eliminating workplace discrimi-

nation to justify such constitutional abuse, and the Ninth Circuit should never have refused to review the error.

A. The Judgment In This Case Is Inconsistent With This Court's Decisions Protecting Public Debate On Issues Of Public Importance.

Although Plaintiff's liability case concerned a number of disputed incidents, as a practical matter it revolved around two critical sets of events: Councilman Campbell's public criticism in the press of Plaintiff's official performance as City Manager, and his alleged encouragement of his political supporters to do the same in letters to the editors of local newspapers.

From Plaintiff's letter to the City Council resigning her position as City Manager, to her Complaint initiating this action, to her own testimony and examination of virtually every other witness in two trials, to her closing argument, Plaintiff asserted in inflammatory and emotional terms that Campbell had violated Title VII by undertaking these activities as a means of retaliating against Plaintiff's exposure of his harassment of City staff. *E.g.*, ER 25, 106, 118, 977-79, 1106, 1114-16, 1281-82, 1290-94, 1305-6, 1506-9, 1566-69, 1573-74, 2067-69, 2267. The City, she argued, thus was vicariously liable for Campbell's retaliation. But Campbell, and the letter writers, undeniably had a constitutional right to speak out on these issues. *E.g.*, *Falwell*, 485 U.S. at 51. And the First Amendment's rights of free expression and association equally protected Campbell's "opportunity to persuade [others] to action." *Claiborne Hardware*, 458 U.S. at 910 (citation omitted). Nor was it constitutionally permissible to inquire into Campbell's motives—or those of the letter-writers—for speaking out. The exercise of First Amendment rights "cannot properly be made to depend on

the[] intent in doing so." *Id.* at 913 (citation omitted).[18] Yet Plaintiff's case depended not just on showing that Campbell did these things, but that he did them *specifically for the purpose of retaliating against her*.

Even more offensive to the First Amendment were Plaintiff's successful efforts to convince the jury that the City Council's failure to publicly disagree with the Mayor or to praise Plaintiff's job performance, and its refusal to "investigate" and "put a stop to" the letters to the press critical of her official performance were in retaliation for her exposure of Campbell's harassment. This, she successfully argued, constituted the City's own direct violation of Title VII. *See, e.g.*, App. A79. But the City Council members had an absolute constitutional right *not* to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Nor was it proper to subject the City to Title VII liability for having refused Plaintiff's demand that it use its police powers to investigate and censor her political critics.[19]

If these events had involved *private* parties and a *private* employer, Plaintiff's contentions very well might have been

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[18]*See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (city ordinance criminalizing speech pertaining to race, religion or gender likely to arouse anger was unconstitutional content discrimination); *Falwell*, 485 U.S. at 53 ("even when a speaker or writer is motivated by hatred or ill-will his expression [is] protected by the First Amendment"). A rule that would allow examination of speakers' "true" motivations and only protect speech animated by government-approved sentiments would be a pernicious invitation to censorship. *E.g.*, *id.* ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred" (citation omitted)).

[19]Nor did Hardin's distress at the public criticism to which she was being subjected, however genuine, have any proper place in this case. The "sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office." *Falwell*, 485 U.S. at 53. And "[c]riticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes . . . official[s'] reputations." *New York Times*, 376 U.S. at 273.

proper. But what Plaintiff steadfastly refused to confront, and apparently persuaded the District Court to overlook, was that she was a high-level *public official* and the employer-defendant in this case was a *government*. In this context, a public official must be prevented from misusing the powerful tools Congress forged to combat workplace discrimination to shape the contours of a public political debate to her liking.[20]

B. The Ninth Circuit Unjustifiably Refused To Address These Questions.

Although these issues were fully briefed and argued below, the Ninth Circuit declined to address them:

> "Finally, the City argues that admission of stipulated evidence regarding bad publicity [Plaintiff] alleged that the mayor initiated in retaliation for her exercising her Title VII rights violated the mayor's first amendment political speech rights and prevents its vicarious liability. The City waived this issue when it stipulated to admission of the evidence and failed to challenge admission of the evidence as a violation of First Amendment freedom of speech." (App. A3-A4)

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[20]The City does not claim it would have been error to allow Plaintiff to predicate liability on any knowingly false statement of *fact* about her; there are no such statements at issue here given the first jury's verdict against her on her defamation claim against Campbell, a verdict she has not appealed. ER 461, 1709. Moreover, nothing the City argues here would limit a plaintiff's remedies for a wide range of wrongful conduct that is not protected by the First Amendment. For example, the ruling the City seeks would not preclude liability for any of the most common acts of discrimination or harassment, because claims among private actors in the private sector generally do not involve public or official discourse on matters of public importance. Moreover, nothing this Court decides here should limit the assertion of harassment or discrimination claims by public employees, except to the limited extent that such claims are based on the public or official discourse of government officials on matters of public or political importance.

This is an unfair and inaccurate reading of the record and the law. At the outset of the first trial, the Defendants moved in limine on a number of grounds to preclude proof or argument concerning the letters to the editor critical of Plaintiff that she contended Campbell had instigated. App. A68, A81, A83, A85, A90. Among other things, this motion sought to preclude any reference to a purported "hostile" letter-writing "campaign," or any other term that "improperly presume[d] or implie[d]" efforts by Campbell or local citizens not "in the normal exercise of their First Amendment rights," both associational and expressive. App. A92.

This motion in limine was sufficient to preserve the issue for appeal without further contemporaneous objection at trial. *Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992); *United States v. Wood*, 943 F.2d 1048, 1054-55 (9th Cir. 1991). Nevertheless, Defendants raised the issue once more during trial:

> "[To charge Campbell with] instigating a hostile letter writing campaign, I think it violates Mr. Campbell's First Amendment rights—I think it also potentially violates these other peoples' rights." (App. A75)[21]

The District Court denied Defendants' motions in limine, and rejected Defendants' arguments that this evidence be excluded. App. A29. It imposed cumulativeness limitations on the number of letters (and authoring witnesses) it would allow, but made clear it would permit evidence and argument concerning Campbell's role in encouraging the letters and the City's knowledge of them. App. A24. In the face of this adverse ruling, the Defendants entered into a stipulation effectuating the District Court's ruling. App. A60. In pre-

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[21]Campbell's counsel raised this objection. App. A75. The ground rules at trial provided that an evidentiary objection by one Defendant would be deemed an objection by both. ER 822.

senting that stipulation to the Court, Defendants' counsel took pains

> "to make clear for the record, we're not waiving any of our prior objections regarding those letters, but at your honor's request, we've attempted to craft a stipulation that . . . meets what your honor has directed us to do." (App. A65)[22]

Contrary to the Ninth Circuit's suggestion, this stipulation waived no objection: The law and common sense confirm that acquiescing in a court-directed stipulation designed to effectuate an adverse ruling *cannot* waive the party's stated objection to that ruling.[23] Here, Defendants expressly *presented* and *preserved* their prior objections.

The Ninth Circuit's refusal to address the City's First Amendment defenses is particularly surprising in light of the Court's decisions imposing an especially vigilant standard of review when liability has been predicated on protected speech or conduct. The First Amendment establishes "a rule of federal constitutional law" requiring "independent appellate review" of the entire record. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1983). The constitutional values at stake "impose[] a special obligation on [a reviewing court] to examine critically the basis on which liability was imposed" (*Claiborne Hardware*, 458 U.S. at 915 (footnote

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[22]The court's prior rulings carried over to the second trial. ER 542. Defendants preserved their objections in the second trial through a motion in limine to maintain this stipulation and have the matter addressed the same way as in the first trial (App. A55) when Plaintiff suggested her proof might deviate from it in the second trial.

[23]*See United States v. Ash*, 461 F.2d 92, 97 n. 6 (D.C. Cir. 1972), *rev'd other grounds*, 413 U.S. 300 (1973) (once court has ruled that evidence is admissible, stipulation to admission of evidence does not waive original objection); *see also United States v. Riley*, 657 F.2d 1377, 1380 n.3 (8th Cir. 1981) (defendant did not waive objection to evidence by agreeing that evidence could be sent to the jury during deliberations after court had already overruled prior objections to the admissibility of the evidence).

omitted)), and conduct its own "independent examination of the whole record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression" (*Bose*, 446 U.S. at 499 (citation omitted); *Claiborne Hardware*, 458 U.S. at 916 n.50). Reversal is *required* if the jury *could have* based Campbell's or the City's liability on protected speech or conduct. *Claiborne Hardware*, 458 U.S. at 924 (reversing where the trial court *may* have assessed liability for some instances of protected speech); *New York Times*, 376 U.S. at 284 (uncertainty as to whether damages were constitutionally awarded compels reversal). *See generally* Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1021 (1996) ("independent judgment review is especially appropriate in harassment cases"). Given the heightened standard of review constitutionally required, the Ninth Circuit should have been loath to find First Amendment protections waived, especially in the face of a record like this one in which the speakers directly and explicitly brought the issue to the trial and appellate courts' attention.

C. The First Amendment Limitations On The Title VII Liability Of Public Entities And Public Officials Asserted Here Raise Important Questions Of Federal Law Affecting State And Local Governments Nationwide.

The First Amendment limitations on the Title VII liability of public entities and public officials that the City urges here are essential to the integrity of local democratic processes. Defining the precise contours of those constitutional limitations is a matter of great and national import. Distinguished state and federal judges and legal commentators have stressed these issues' importance and urged this Court's guidance on the intersection of Title VII and the First Amendment:

> "Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech . . . . Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court's offhand pronouncements are unilluminating. (*DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir. 1995) (citations omitted))

See also United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (*Kozinski, J., dissenting*), *rev'd*, 513 U.S. 64 (1994) ("Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds"); *see also* Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991). The same concerns are raised in this case by the assessment of Title VII retaliation liability based solely on public speech and expressive conduct on matters of public concern. *E.g., Bain v. City of Springfield*, 678 N.E.2d 155, 161 (Mass. 1997) ("What we most emphatically cannot countenance as an instance of retaliation is the mayor's response in the local newspaper to the charges against him. . . . The interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on core political speech").

For these reasons, the Court should grant certiorari to consider the important First Amendment issues this case raises. Alternatively, the Court should grant the Petition, summarily vacate the decision below and order the Ninth

Circuit to decide the First Amendment issue on its merits. *See* Part I(D), *supra*.

CONCLUSION

For all of the foregoing reasons, the Court should grant the instant Petition, and either entertain the important issues raised herein, or alternatively summarily vacate the Ninth Circuit's decision, and remand with instructions to decide the jurisdictional and First Amendment issues the Ninth Circuit declined to consider before.

DATED: March 8, 1999.

Respectfully,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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DECISION OF THE NINTH CIRCUIT, FILED OCTOBER 16, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEIL S. HARDIN, Administration of Rita Ellen Hardin's estate, Plaintiff-Appellee, v. CITY OF CONCORD, Defendant-Appellant.	No. 96-16213 D.C. NO. CV 93-1297 WHO MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted September 16, 1998
San Francisco, California

Before: T.G. NELSON, THOMAS and SILVERMAN, Circuit Judges.

The City appeals a $1.2 million jury verdict for Hardin for sexual harassment and retaliation in violation of Title VII, 42 U.S.C. § 2000e, and wrongful constructive discharge. We have jurisdiction pursuant to 28 U.S.C. § 1331

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

and affirm the jury verdict. Because the parties are aware of the facts of this case, we will not recite them in this decision.

The City first argues that the jury verdict should be reversed because Hardin was exempt from coverage of Title VII as a policymaker not covered by civil service laws. See 42 U.S.C. § 2000e(f). When the district court denied the City's motion for summary judgment, the question of whether Hardin was exempt from Title VII's coverage remained an issue for the jury. The City failed to present the issue to the jury in either of its trials or to renew its motion for judgment as a matter of law at the second trial. This court lacks authority to consider the motion for judgment as a matter of law. *See Desrosiers v. Flight Int'l of Florida Inc.*, No. 97-16062, slip op. 10907, 10917 (9th Cir. Sept. 15, 1998) (holding that because the party failed to make a Rule 50(b) motion to the trial court, the court of appeals lacked the power to grant or consider the judgment as a matter of law); *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (holding that denial of a motion for summary judgment is not reviewable after a jury has heard the case); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963) (holding that ruling on a Rule 50(b) motion for directed verdict from the first trial is not reviewable on appeal from a judgment of the second trial).

The City argues that the district judge erred in granting Hardin's motion for new trial after the first trial because he erroneously relied on evidence of sexual harassment of other employees to find a hostile work environment. We review a grant of a motion for new trial for an abuse of discretion because we defer to the trial court's more intimate knowledge of the case and facts. *California Sansome Co., v. United States Gypsum, Co.*, 55 F.3d 1402, 1405 (9th Cir. 1995). For Hardin to establish a hostile environment, she must prove that the sexual harassment was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Because the

district judge relied on the incidents of other employees only to the extent they impacted on Hardin and the record contains ample evidence of a hostile work environment relevant to her, he did not err in granting the new trial.

The district judge also granted a new trial on Hardin's retaliation claim finding that the jury's conclusion that Hardin failed to engage in protected opposition to the harassment was against the weight of the evidence. To establish retaliation, Hardin must prove that: (1) she engaged in protected activity or opposition; (2) she suffered an adverse employment decision and (3) there was a causal link between her activity and the employment decision. *Trent v. Valley Electric Ass'n*, 41 F.3d 524) 526 (9th Cir. 1994). There is ample evidence in the record of the first trial that Hardin engaged in opposition to the sexual harassment. Thus, the district judge did not abuse his discretion in granting a new trial.

The City argues that the district court erred in instructing the jury regarding its vicarious liability at the second trial. We review the district court's formulation of civil jury instructions as a whole for an abuse of discretion to determine if they are misleading or inadequate. *Abromson v. American Pac. Assurance Co.*, 114 F.3d 898, 902 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998). The jury instructions in this case complied with the law of this circuit regarding vicarious liability of employers in Title VII cases. *See Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The instructions are also consistent with the Supreme Court's recent opinions in *Burlington Industries, Inc., v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). Thus, the City's claim is without merit.

Finally, the City argues that admission of stipulated evidence regarding bad publicity Hardin alleged that the mayor initiated in retaliation for her exercising her Title VII rights violated the mayor's first amendment political speech rights and prevents its vicarious liability. The City waived

this issue when it stipulated to admission of the evidence and failed to challenge admission of the evidence as a violation of First Amendment freedom of speech. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) (acknowledging that generally the court will not consider issues raised for the first time on appeal).

Because we affirm the Title VII claims, we need not consider the City's challenge to the wrongful constructive discharge claim based on the supposed invalidity of the Title VII claims.

AFFIRMED.

DECISION OF THE UNITED STATES DISTRICT COURT, FILED JULY 30, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendant.	No. C-93-1297 WHO MEMORANDUM DECISION AND ORDER

Defendants Byron Campbell ("Campbell") and the City of Concord ("the City") have filed motions seeking a new trial on the grounds of jury instruction error, erroneous evidentiary rulings, and on the ground that the verdicts were against the clear weight of the evidence. In the alternative, the City asks that the damages awarded against it be reduced. For the reasons hereinafter set forth, defendants' motions are denied.

I.

The facts of this case are well known both to the Court and to the parties, so a repetition of them is unnecessary. Instead, a brief procedural history will suffice.

The Court held a six-week jury trial in October and November 1994 on the claims brought by plaintiff Rita Hardin ("Hardin") for sex discrimination, sexual harassment,

retaliation, wrongful constructive termination, breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, and assault and battery. The jury overwhelmingly rejected Hardin's claims, finding in favor of defendants on all but one claim, awarding Hardin $75,000 for breach of the implied covenant of good faith and fair dealing against the City.

Hardin moved for a new trial. On May 3, 1995, the Court granted Hardin's motion for a new trial on her claims of retaliation, hostile work environment, and wrongful constructive termination after concluding that the jury's verdicts an these three claims went against the clear weight of the evidence.

A second jury trial took place in February and March 1996. This time, the jury found in favor of Hardin on all counts and awarded her $1.231 million in damages against the City and $65,000 in damages against Campbell.[1]

II.

Rule 59(a) authorizes the Court to grant a new trial on all or part of a jury trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a).

> [T]he general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair . . . [T]he motion may also raise questions of law arising out of substantial errors in the admission or rejection of

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[1]The breakdown of damages was as follows:

The City:	Economic	$ 631,000
	Noneconomic	600,000
Campbell:	Economic	$ 15,000
	Noneconomic	50,000

> evidence or the giving or refusal of instructions . . . . The court has the power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice.

11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §2805, at 54-55 (2d ed. 1995) (hereinafter "Wright & Miller").

In addition, the Court is guided by Rule 61 of the Federal Rules of Civil Procedure, in accordance with which "Only those errors that have caused substantial harm to the losing party . . . justify a new trial." Wright & Miller §2805 at 60. Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61.

A.

Both defendants argue that (1) the jury instruction on hostile work environment was erroneous, (2) the jury instruction defining "adverse employment action" was erroneous, and (3) the Court erred in refusing to instruct the jury that emotional distress caused by the first trial was not recoverable. In addition, the City claims that (1) the jury instructions on agency, supervisor, and scope of authority were erroneous, and (2) the jury instruction on wrongful constructive termination omitted two elements.

On appeal, jury instructions are generally reviewed to determine whether the district court abused its discretion. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). The proper inquiry is whether the charges as a whole "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* (citation omitted). "A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented." *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 726 F.2d 1381, 1398 (9th Cir.) (citations omitted), *cert. denied,* 469 U.S. 990 (1984).

An error of law in jury instructions in a civil case requires reversal unless the error is more probably than not harmless. *Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir. 1992). An error is harmless if the result would more probably than not have been the same. *Id.* at 207. "In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." Id. Jury instructions and special verdict forms should be reviewed together to determine whether the jury was misled. *Boggs v. Lewis,* 863 F.2d 662, 666 (9th Cir. 1988).

1.

Both defendants argue that one of the Court's hostile work environment instructions misstated the law of sexual harassment under the California Fair Employment and Housing Act ("FEHA"). In particular, they contend that the wording of the instruction could have allowed the jury to conclude that Hardin was not herself personally subjected to harassment, but that a hostile work environment nevertheless existed due to Hardin's "mere awareness" of Campbell's conduct towards other women in City Hall. This, they con-

tend, would be insufficient to show a hostile work environment as a matter of California law. Defendants, thus, reiterate an argument that was raised and rejected by the Court at trial.

The Court's instruction to the Jury provided that Hardin had to prove that "defendant Campbell's conduct was either directed toward [Hardin] or the conduct was directed toward other employees and [Hardin] was aware of or witnessed the conduct." (Jury Instructions at 26 ¶2.)

Defendants rely on *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 262 Cal. Rptr. 842 (1989). In *Fisher*, the court of appeal reversed the lower court's order, which sustained defendants' demurrers without leave to amend, and directed the lower court to grant the plaintiff leave to amend her complaint. The *Fisher* court agreed with the conclusion that the plaintiff's amended complaint had failed to state a claim for hostile work environment sexual harassment under the FEHA. In her complaint, the plaintiff had alleged sexual harassment of other employees, but had failed to allege either that she was a direct victim of sexual harassment or that she had been personally exposed to the sexual harassment of the other employees. The court explained the pleading requirements as follows:

> [O]ne who is personally subjected to offensive remarks and touchings, can establish a hostile work environment by showing that harassment existed in the place of employment. However, one who is not personally subjected to such remarks or touchings, must establish that she personally witnessed the harassing conduct and that it was in her immediate work environment.

Id. at 610-11, 262 Cal. Rptr. at 853.

In this case, Hardin falls within the former category because she alleged in her complaint, and presented evidence at trial, that she was "personally subjected to offensive remarks and touchings" by Campbell. *Id.* at 610-11, 262 Cal. Rptr. at 853. Therefore, under *Fisher*, Hardin was enti-

tled to offer as proof of her hostile work environment claim evidence "showing that harassment *existed* in the place of employment." *Id.* at 611, 262 Cal. Rptr. at 853 (emphasis added).

Defendants misread *Fisher* for two reasons. First, as just noted, personally witnessing the conduct towards others is required where, as here, Hardin was herself subjected to offensive remarks and touchings by Campbell. Only where a plaintiff "is *not* personally subjected to such remarks or touchings, must (she) establish that she personally witnessed the harassing conduct." *Id.* (emphasis added). Therefore, *Fisher* does not support defendants' contention that the jury instruction was erroneous; to the contrary, *Fisher* supports the way in which the jury was instructed.

Second, the crux of the *Fisher* decision is simply that "a plaintiff should be required to plead sufficient facts to establish a nexus between the alleged sexual harassment of others, her observation of that conduct and the work context in which it occurred." *Id.* at 613, 262 Cal. Rptr. at 854-55. The jury instructions in this case were in accord with *Fisher*. The Court instructed the jury that Campbell's conduct towards others was only relevant insofar as that conduct created a hostile or abusive working environment *for Hardin*. In particular, the jury was instructed that Hardin had to "show a connection between the sexual harassment of other employees and the existence of a hostile or abusive work environment for *her*." (Jury Instructions at 30 (emphasis added).)

Jury instructions are properly viewed as a whole to determine whether they adequately inform the jury. *Underhill v. Royal*, 769 F.2d 1426, 1433 (9th Cir. 1985). In addition to the instructions already mentioned, the jury was instructed to find a hostile work environment only if they found that (1) Campbell's conduct "was sufficiently severe or pervasive to alter the conditions of [Hardin's] employment," (2) Hardin "actually perceived her work environment to be hostile or abusive," (3) a "reasonable woman" would

perceive the work environment to be hostile, and (4) Campbell's "conduct . . . involve(d] more than isolated or trivial acts." (Jury Instructions at 26-28.) These instructions, not complained of by defendants, accurately state the law, and the jury is presumed to have followed them. Taken as a whole, the hostile work environment instructions set a sufficiently high threshold to preclude a finding of hostile work environment based on trivial conduct or Hardin's "mere awareness" of others being harassed by Campbell.

Even assuming the Court erred by instructing the jury on this point, the Court finds that the error was harmless because it more probably than not had no effect on the outcome. *Caballero*, 956 F.2d at 207. The clear weight of the evidence supports Hardin's allegation that Campbell *did* sexually harass her personally.

2.

Defendants next argue that the Court's definition of "adverse employment action" was overly broad and vague. The Court instructed the jury as follows:

> Adverse employment action can, but does not have to, result in an economic or tangible loss such as termination or denial of a salary increase. Adverse employment action can also be action that results in an intangible loss, such as unwarranted performance evaluations, or action that results in an unfavorable change in the normal benefits, rights, or conditions of plaintiff's employment.

(Jury Instructions at 41.) According to defendants, retaliation requires a finding of tangible loss of salary, benefits, job title, or duties.

As Hardin argues, however, defendants' definition of adverse employment action is too narrow. Cases interpreting Title VII have found that a broad range of actions can constitute adverse employment action. "Title VII does not limit

adverse job action to strictly monetary considerations. one does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture." *Collins v. Illinois*, 830 F.2d 692, 703 (7th Cir. 1987). For example, "an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary [sic] and support services" all constitute adverse employment actions. *Id.* (footnotes omitted). In sum, "an objectively demeaning change of working conditions . . . can amount to" an adverse employment action.[2] *Darnell v. Campbell County Fiscal Ct.*; 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (6th Cir. 1991); *see generally* 2 Lex K. Larson, *Employment Discrimination* §34.04, at 34-52 to 34-66 (2d ed. 1995).

Campbell attempts to distinguish such cases on the grounds that a FEHA retaliation claim is narrower than one under Title VII. There is no authority for that proposition. As Hardin argues, the FEHA is interpreted by California courts in light of Title VII case law. *Flait v. North Am. Watch Corp.*, 3 Cal. App. 4th 467, 475-76, 4 Cal. Rptr. 2d 522, 528 (1992). Indeed, the Ninth Circuit has interpreted the FEHA as broadly as Title VII on the issue of what constitutes an adverse employment action. *See Strother v. Southern Cal. Permanente Medical Group*, 79 F.3d 859, 868-69 (9th Cir. 1996).

In *Strother*, the Ninth Circuit concluded that, while "mere ostracism in the workplace is not enough to show an adverse employment decision," the plaintiff, a doctor, had nevertheless stated a prima facie case for retaliation under the FEHA by showing that she was excluded from educa-

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[2]Retaliation can even take the form of sexual harassment — i.e., the accused harasser continues to engage in or increases the harassment. *See, e.g., Fisher*, 214 Cal. App. 3d at 615, 262 Cal. Rptr. At 856.

tional seminars and meetings, that she suffered verbal and physical abuse, that she was denied secretarial support, and that she was given a more burdensome work schedule. *Id.* at 869 (citation omitted).

The Court is satisfied that its instruction accurately reflects the law in the Ninth Circuit for a retaliation claim under the FEHA and Title VII.

3.

Defendants next argue that the Court erred by refusing to instruct the jury that Hardin could not recover damages for emotional distress caused by the stress of litigation. This argument was made and rejected by the Court at trial. Defendants have cited no authority for this argument. The two California cases cited by Campbell, *Pleasant v. Celli*, 18 Cal. App. 4th 841, 22 Cal. Rptr. 2d 663 (1993), and *Merenda v. Superior Ct.*, 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87 (1992), both hold that emotional distress damages are unavailable in legal malpractice actions. They make no mention of instructing the jury on the issue of emotional distress damages and are wholly inapposite.

The case cited by the City is likewise inapplicable. In *School Dist. No. 1 v. Nielsen*, 534 P.2d 1135 (Or. 1975), the court reversed damages for "humiliation" awarded to the plaintiff during an administrative agency hearing, where there was no evidence whatsoever that the plaintiff had suffered any humiliation. In so doing, the court noted that the plaintiff could not collect damages for her complaints about the pressures of litigation, which were not compensable. The case does not in any way involve the issue of jury instructions.

Campbell contends that the requested instruction was necessary because it was nowhere explained to the jury that litigation-related stress was not compensable. That is not entirely accurate. The Court specifically instructed the jury that it must find that defendants' wrongful conduct had proximately caused Hardin's damages in order to award

those damages. Obviously, litigation is not part of defendants' wrongful conduct.

The absence of case law on this issue confirms the Court's view that defendants' argument is not well taken. Obviously, there are thousands of cases on the books in which a plaintiff who sought and was awarded emotional distress damages was required to go through litigation. Yet the Court could discover no case in which a court instructed the jury that emotional distress caused by the litigation process itself was not recoverable.

4.

The City argues that the jury instruction on wrongful constructive termination was erroneous because it failed to include the required elements of intent and "aggravating conditions." These arguments, made and rejected at trial, are specious. The jury instruction included the following element: "Defendant City of Concord either intentionally created or knowingly permitted working conditions to remain intolerable, and could have remedied the situation but did not do so." (Jury Instructions at 50.) According to the City, this instruction was fatally flawed because the court omitted the phrase "in order to force the employee to resign" at the end of the sentence. For this proposition, the City relies on *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994). This argument misstates the holding of *Turner*.

The *Turner* court explicitly *rejected* an express intent requirement, reasoning as follows:

> An employer's intent to cause a resignation will rarely be revealed by direct evidence. Self interest will most often prevent an employer from announcing a constructive discharge strategy from the rooftops. *An express intent requirement might unduly focus the trier of fact's attention on the presence or absence of direct evidence.* But we see no reason why a standard requiring the

> employer's actual (rather than mere constructive) knowledge of the intolerable conditions would do so.

Id. at 1249, 32 Cal. Rptr. at 229 (emphasis added). As the *Turner* court explained, direct evidence of intent, is not necessary; it can be inferred from the fact that the employer *actually knew* about the intolerable conditions and refused to remedy them. *Id.* at 1249-50, 32 Cal. Rptr. at 1028. Ultimately, the court established the elements as follows:

> In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or *knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person* in the employee's position would be compelled to resign.

Id. at 1251, 32 Cal. Rptr. at 230. This is precisely what the jury instruction reflected. The instruction also tracks the BAJI instruction, which cites the *Turner* case as its basis.

The City also contends that the Court failed to require Hardin to prove "aggravating conditions" over and above a violation of public policy. This is untrue. The jury instruction specifically included as an element the following: "The working conditions were so intolerable or aggravated at the time of [Hardin's] resignation that a reasonable person in [Hardin's] position would have felt compelled to resign[.]" (Jury Instructions at 37, ¶4.)

5.

The City next argues that the jury instructions on the nature of Campbell's agency and whether or not he was a supervisor were erroneous. The content of these instructions was debated extensively by the parties during trial. Ulti-

mately, the Court determined that the jury should decide whether or not Campbell was Hardin's "supervisor" and whether or not he was an "agent" based on standard pattern instructions on those issues.

The City cites no authority for its proposed instructions. The City's complaints about the Court's pattern instructions appear to be based on the preposterous premise that Campbell was not an agent, supervisor, or employee of the City. It is simply not possible, however, that Campbell did not fall into one of those categories—otherwise, what was he? A mere bystander? The City has consistently tried to disavow any relationship whatsoever between Campbell and itself, when in fact Campbell was the Mayor of Concord, the highest-ranking officer of the City and, thus, the person most closely associated with the City *qua* municipality.

Even assuming, arguendo, that the jury instructions were incorrect, the error was harmless because those instructions could not have affected the outcome. *Caballero*, 956 F.2d at 207. In its special verdict, the jury determined that the City knew or should have known about Campbell's conduct but failed to remedy it. Regardless, therefore, of whether Campbell was an agent, supervisor, or merely a co-worker of Hardin, this finding alone is sufficient to hold the City liable for Campbell's actions under both the FEHA and Title VII.

The City likewise contends that, as a matter of law, Campbell was not an agent of the City acting within the scope of his authority when he engaged in sexually harassing conduct or retaliation. For this proposition, the City cites *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478 (1995).

In *Farmers*, the California Supreme Court held that, under the state Tort Claims Act, the County of Santa Clara was not required to indemnify one of its deputy sheriffs and pay his defense costs in a sexual harassment lawsuit brought by several female deputy sheriffs. In so holding, the court relied on cases in which courts had refused to hold an

employer vicariously liable for an employee's actions "where the misconduct does not arise from the conduct of the employer's enterprise" but instead from purely personal motives, *viz.*, where "the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." *Id.* at 1005-06, 47 Cal. Rptr. 2d at 487-88. The court concluded that the deputy sheriff's sexual harassing activity was "[n]either typical of [n]or broadly incidental to the operation of a county jail or to the duties and tasks of deputy sheriffs at such a jail." *Id.* at 1011, 47 Cal. Rptr. 2d at 491. Therefore, the County was not required to indemnify the deputy sheriff under state law.

As Hardin points out, however, *Farmers* was limited to the issue of whether indemnification for sexual harassment was required under California's Tort Claims Act. The *Farmers* court explicitly recognized that the County nonetheless could be held "*directly* liable to sexually harassed employees for compensatory damages in civil actions under FEHA." *Id.* at 1014, 47 Cal. Rptr. 2d at 493 (emphasis added). Such direct liability exists *independent* of the derivative liability also provided for by the FEHA. *Id.* at 1014 and n.12, 47 Cal. Rptr. 2d at 493 and n.12; *see also Caldwell v. Montoya*, 10 Cal. 4th 972, 989 n.9, 42 Cal. Rptr. 2d 842, 853 n.9 (1995). Under the FEHA, an employer is strictly liable for sexual harassment of employees by its agents and supervisors. *Kelly-Zurian v. Wohl-Shoe Co.*, 22 Cal. App. 4th 397, 415, 27 Cal. Rptr. 2d 457, 466 (1994) (Citing *Fisher*, 214 Cal. App. 3d at 608 n.6, 262 Cal. Rptr. at 851 n.6).

Moreover, as noted above, even if Campbell was not an agent or supervisor for purposes of the FEHA, the jury's verdict would remain intact. The City would still be liable based on Campbell's conduct because the jury found that the City knew or should have known about Campbell's conduct and failed to take prompt, effective action to remedy it. This

finding gave rise to liability under both the FEHA and Title VII.

B.

Campbell also contends that the Court erred by excluding Rhoma Young's testimony.

At the first trial, the Court excluded the Kay & Stevens report and the testimony of investigator Carol Stevens pertaining to the contents of the report, under Rule 403 of the Federal Rules of Evidence. The Court reasoned as follows:

> First, evidence of the report would be unduly prejudicial, because it would effectively take key determinations away from the jury. Second, much of the evidence in the report was cumulative. Many Concord workers who gave witness statements in the course of the investigation also testified at trial. The jury could assess the credibility of the witnesses as well as Carol Stevens could. Just because Carol Stevens is an attorney does not mean she was better qualified to judge credibility than the jury. Finally, introduction of the report would have dramatically lengthened the trial, because Campbell would have been required to attack the findings contained therein.

(Mem. Decision & Order filed May 3, 1995 (rejecting Hardin's argument that the Court erroneously excluded the evidence at trial).)

In doing so, the Court also excluded Young's expert testimony, which pertained only to the validity of the Kay & Stevens report's methodology and conclusions. The court *did* allow Hardin to introduce the City Council's Resolution 92-16, however, for purposes of showing that the city had notice of Campbell's conduct.

Before the second trial, the Court ruled that Stevens would be allowed to testify that Hardin reported problems with Campbell to her, because those statements were offered not for their truth but to show that Hardin had reported the

incidents. The Court, however, reiterated its ruling at the first trial that Stevens could not testify "regarding her findings of retaliation and the weakening of the language of Resolution 92-16 under Federal Rule of Evidence 403 because the probative value of this evidence is substantially outweighed by the danger of misleading or confusing the jury as to their fact finding role." (Order re Mots. In Limine for Second Trial filed Jan. 18, 1996.)

Campbell claims that once Stevens was allowed to testify at the second trial, thereby introducing additional evidence about the investigation, Campbell was prejudiced because the Court did not allow him to challenge the conclusions and methodology of the Kay & Stevens report through Young's testimony.

As Hardin argues, however, Stevens' testimony was admitted only to show that the City had notice of Campbell's conduct. Stevens was permitted to testify to what Hardin told her about Campbell's conduct during the course of the Kay & Stevens investigation. None of the evidence was admitted against Campbell or admitted for its truth; rather, it was subject to explicit limiting instructions admitting it solely against the City in order to show that the City was on notice of the harassment.

The Court's decision to admit Stevens' testimony did not open the door to all testimony regarding the Kay & Stevens investigation and report, nor did it alter the limited purposes for which other evidence, such as the Resolution, had already been offered during the first trial. The methodology and conclusions of the Kay Stevens report were irrelevant to Stevens' testimony at trial; therefore, Young's testimony was properly excluded.

C.

The City argues that the Court erred by admitting evidence regarding the so-called hostile letter-writing campaign. The Court finds that the City waived this objection by failing to raise it prior to the second trial and so does not reach its

merits. Furthermore, Hardin, the City and Campbell entered into a Stipulation that they requested the Court read to the jury. The parties agreed that the Stipulation would provide the factual basis from which the jury could infer whether Campbell organized the letter-writing campaign and what effect, if any, it had on Hardin and the notice of Campbell's actions to the City.

D.

Finally, the City moves for a new trial on all three claims on the ground that the jury verdicts were against the weight of the evidence. In the alternative, the City asks the Court to reduce the damages awarded as excessive.

A district court may grant "a motion for a new trial pursuant to [Rule] 59 if the verdict is against the clear weight of the evidence." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). This standard gives the district court more discretion than it possesses in deciding a motion for judgment as a matter of law. "The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Id.* (citations omitted). The Ninth Circuit has cautioned that this discretion should not be construed so broadly as to cause courts to usurp the role of the jury:

> [A] decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Id. at 1371-72 (quoting C. Wright & A. Miller, *Federal Practice and Procedure* §2806 at 48-49 (1973)).

The Court has, of course, already granted a new trial in this case because the first jury found in favor of defendants against the clear weight of the evidence. Thus, the Court is somewhat taken aback by the City's argument that the verdicts in the second trial were against the clear weight of the evidence after the jury returned a verdict for *Hardin*.

The Court finds that the jury's verdicts against defendants on Hardin's claims of sexual harassment, retaliation, and wrongful constructive termination[3] were not against the clear weight of the evidence, nor were the damages awarded excessive.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motions for a new trial are DENIED.

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[3]The Court's determination that the City is not entitled to a new trial on the wrongful constructive termination claim makes it unnecessary to reach the City's motion for judgment as a matter of law on that claim, as such a motion is subject to a more stringent standard. *See* Fed. R. Civ. P. 50.

2. The City's motion for judgment as a matter of law on the claim of wrongful constructive termination is DENIED.

Dated: July 30, 1995.

/s/
William H. Orrick
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT, NOVEMBER 10, 1994

THE COURT: GOOD MORNING, COUNSEL. PLEASE BE SEATED. FIRST, I'M GOING TO DEAL WITH THE RULE 50 MOTIONS. I HAVE READ CAMPBELL'S RULE 50 MOTION AND I DENY IT. I THINK THERE IS ENOUGH IN THERE FOR THE JURY TO MAKE UP ITS MIND. IT'S A QUESTION OF FACT AND THE APPLICATION OF THE INSTRUCTIONS.

NEXT, WITH RESPECT TO THE RULE 50 MOTIONS FILED BY THE CITY ON THE QUESTION OF WHETHER OR NOT THERE'S INTENTIONAL DISCRIMINATION BY CONCORD, I DENY THAT MOTION. THE JURY IS GOING TO WEIGH THE EVIDENCE AND MAKE ITS DETERMINATIONS WITH REGARD TO THE CREDIBILITY OF THE WITNESSES.

* * * *

NEXT, THE SAME OLD ARGUMENT ABOUT WHETHER OR NOT THE PLAINTIFF IS COVERED BY TITLE VII. THAT IS A MOTION FOR RECONSIDERATION, ABOUT THE FOURTH. AND, LIKE THE OTHERS, IT'S DENIED OUT OF HAND.

DECISION OF THE UNITED STATES DISTRICT COURT, OCTOBER 6, 1994

(JURY NOT PRESENT)

THE COURT: MORNING, COUNSEL.

MS. SHOSTAK: MORNING, YOUR HONOR.

THE COURT: WE HAVE A BART PROBLEM THIS MORNING, SO WE'RE SHY TWO JURORS, BUT I'M SURE WE CAN MAKE GOOD USE OF THIS TIME.

FIRST, WITH RESPECT TO WHAT WE CALLED THE PACKAGE YESTERDAY, AND THE NEWSPAPER CLIPPINGS, I AM NOT GOING TO ADMIT THOSE NEWSPAPER CLIPPINGS; THEY INCLUDE SOME FACTS—WHAT PURPORT TO BE FACTS, WHICH ARE NOT FACTS IN THIS CASE. FOR EXAMPLE, RACE ISN'T IT A FACTOR IN THE CASE. AND THESE ARE JUST THE KIND OF NEWSPAPER CLIPPINGS THAT WE WARNED THE JURORS NOT TO LOOK AT. SO THEY ARE NOT—WILL NOT BE ADMITTED.

SECONDLY, WITH RESPECT TO THE LETTERS, THE LETTERS, AS EVERYBODY KNOWS, CONTAIN NOTHING BUT SCURRILOUS COMMENTS WITH RESPECT TO THE PLAINTIFF AND HER—HOW SHE CARRIES OUT HER DUTIES, BUT I'M NOT GOING TO ADMIT THE LETTERS; IF I DO, I THINK I'M ASKING FOR 60 MORE WITNESSES, IF THAT'S IT, AND I DON'T THINK THAT, STANDING BY THEMSELVES, THEY'RE RELEVANT, NOR DO I THINK THAT THEY COULD RISE TO THE DIGNITY OF AN APPROPRIATE INFERENCE TO HAVE BEEN DRAWN FROM THE FACT THAT THERE WERE TWO OR THREE BEFORE THE MEETING, AND A NUMBER AFTERWARDS.

I WILL, HOWEVER, IF THE PLAINTIFF WANTS TO GO AHEAD, I WILL SELECT AT RANDOM THREE LETTERS, AND I WILL ASK COUNSEL TO STIPULATE WITH RESPECT TO THE NUMBER OF OTHER LETTERS. AND IF THEY DON'T STIPULATE, I'LL SIT

DOWN WITH THEM, AND WE'LL ALL TOGETHER SIT DOWN AND COUNT THE OTHER LETTERS.

NOW, I DON'T KNOW IF THAT'S SATISFACTORY OR NOT.

DO YOU STILL WANT TO OFFER THE LETTERS?

MS. SHOSTAK: I WOULD LIKE—I STILL WOULD LIKE TO OFFER—WHAT I WOULD LIKE TO HAVE IN EVIDENCE, YOUR HONOR, IS THE—THE COMPARATIVE NUMBER. AND I CAN UNDERSTAND YOUR HONOR'S NOTION OF A RANDOM SELECTED SAMPLING, AND I THINK THAT THAT—I CAN UNDERSTAND YOUR HONOR'S RATIONALE THAT THAT BALANCES THE INTERESTS OF THE—THE TWO PARTIES, AS LONG AS THAT DOESN'T MEAN THAT WE'RE BARRED FROM ARGUING THAT THERE WAS THIS PHENOMENON OF THIS CRITICISM IN THE SPRING, AND IT WAS BROUGHT TO THE COUNCIL'S ATTENTION.

AS I UNDERSTAND FROM YOUR HONOR'S RULING, YOU ARE PERMITTING US TO WALK A MIDDLE LINE IN—IN THAT REGARD?

THE COURT: YES.

MS. SHOSTAK: OKAY. THAT—THAT IS—THAT IS ACCEPTABLE, YOUR HONOR.

THE COURT: ALL RIGHT. SO, THEN, YOU AND MR. GLAESSNER, I GUESS, ARE THE TWO MAIN PARTIES INVOLVED, YOU CAN SIT DOWN AND TELL ME THE EXACT NUMBER, AND WHEN YOU'VE DONE THAT, I'LL TAKE THESE AND PULL OUT THREE.

YES, MR. GLAESSNER.

MR. GLAESSNER: COULD I—COULD I JUST ASK FOR A BIT OF CLARIFICATION?

THE COURT: YES.

MR. GLAESSNER: I UNDERSTAND YOUR HONOR'S RULING, AND I THINK THAT'S CERTAINLY A MIDDLE GROUND, AS MS. SHOSTAK

SAYS. OBVIOUSLY, THE JURY'S ALREADY HEARD ABOUT THE NUMERICAL DIFFERENCE BETWEEN THE LETTERS BEFORE AND AFTERWARDS, AND I WOULD EXPECT THAT WE WOULD WANT TO CERTAINLY ASK MR. CAMPBELL TO COMMENT UPON THAT, IN TERMS OF ANY PURPORTED INVOLVEMENT ON HIS PART. BUT AS TO ANY LETTERS THAT—THAT DO COME INTO EVIDENCE, I WOULD ASK THAT THE COURT BE WILLING TO PERMIT US, NOT, OBVIOUSLY, TO CALL EACH AND EVERY LETTER WRITER, BECAUSE THE LETTERS AREN'T COMING IN, BUT TO CALL AT LEAST THOSE PERSONS THAT RELATE TO THE LETTERS THAT ARE COMING INTO EVIDENCE, OR ONE OR TWO PEOPLE, JUST GENERALLY TO EXPLAIN THAT THEY WROTE LETTERS BECAUSE THEY BELIEVED IN WHAT THEY SAID, THEY DIDN'T DO IT AT MR. CAMPBELL'S REQUEST. IN OTHER WORDS, I DON'T WANT TO CALL 60 PEOPLE; I'D LIKE TO BE ABLE TO CALL ONE OR TWO OR THREE PEOPLE MAYBE, IF NECESSARY.

THE COURT: WELL, YOU CAN CALL THE PURPORTED WRITERS OF THE LETTERS WHICH I SELECT BY RANDOM. AND THOSE WITNESSES CAN BE DEPOSED BEFORE THEY APPEAR, IF THEY, INDEED, ARE GOING TO APPEAR.

MS. SHOSTAK: YOUR HONOR, MAY I ASK A POINT OF CLARIFICATION? UNDER YOUR HONOR'S RULING, WOULD IT BE PERMISSIBLE FOR PLAINTIFF TO CROSS-EXAMINE MR. CAMPBELL ON HIS AWARENESS OF THE BREADTH OF THE LETTERS

THE COURT: OH, YES, THAT'LL BE —

MS. SHOSTAK: —AND WHETHER HE HAD A RELATIONSHIP TO THE PEOPLE WHO WROTE THOSE LETTERS? AND I MEAN MORE THAN JUST—

I MEAN MORE THAN JUST THE THREE RANDOM. AND —

THE COURT: WELL, YOU CAN EXAMINE HIM WITH RESPECT TO HIS KNOWLEDGE OF THE LETTERS, BUT AS SOON AS YOU GET INTO INDIVIDUALS, THEN HE'S ENTITLED TO BE ABLE TO CALL THOSE INDIVIDUALS, AND AS I'VE JUST GOTTEN THROUGH, WE'RE GOING TO HAVE THREE, AT THE MOST, AND THEY'RE GOING TO BE THREE THAT ARE INDIVIDUALS THAT WERE SIGNATORY TO THE LETTERS THAT I SELECT AT RANDOM. AND I'LL LET YOU AND MR. GLAESSNER AGREE ON THE STIPULATION. I'LL SIT HERE AND HOLD UP THE LETTERS, AND PULL OUT ONE, TWO OR THREE.

MS. SHOSTAK: YOUR HONOR, I'M NOT—I'M NOT ARGUING WITH YOUR HONOR, I'M TRYING TO MAKE SURE I UNDERSTAND —

THE COURT: YEAH.

MS. SHOSTAK:—SO I GET IT RIGHT. WILL I BE PERMITTED, IN ADDITION TO THE THREE RANDOM LETTERS —

THE COURT: YES.

MS. SHOSTAK: —TO ASK HIM IF HE WAS GENERALLY AWARE OF THE LETTERS THAT WERE APPEARING, AND IF HE KNEW OR HAD A—A BUSINESS, POLITICAL OR FRIENDSHIP RELATIONSHIP WITH LETTER WRITERS OTHER THAN THE THREE THAT ARE ARE GOING TO BE RANDOMLY SELECTED?

THE COURT: YES. I THINK THAT'S PROPER CROSS-EXAMINATION, AND THE STIPULATION WILL BE IN EVIDENCE.

MS. SHOSTAK: THANK YOU, YOUR HONOR.

MR. GLAESSNER: YOUR HONOR, I'M SORRY TO KEEP GOING ON THIS, BUT IT'S A COMPLICATED POINT, IN TERMS OF HOW THIS PROCEEDS. AND I

GUESS I'M REALLY ASKING THE COROLLARY OF WHAT MS. SHOSTAK IS ASKING YOU.

AM I PERMITTED ON MY CROSS-EXAMINATION OF MRS. HARDIN, THEN, TO GO INTO HER—HER BELIEFS AND HER UNDERSTANDING OF WHO WROTE A LETTER THAT WAS NOT ACTUALLY WRITTEN BY THEM? WHOSE NAME APPEARS IN A LETTER THAT WAS NOT ACTUALLY WRITTEN BY THEM? BECAUSE THAT'S SOMETHING THAT WAS GONE INTO IN HER DEPOSITION, AND I WANT TO HAVE THE OPPORTUNITY, ASSUMING THAT THAT'S WHAT THE COURT IS PERMITTING, TO GO INTO THAT ON HER CROSS-EXAMINATION.

THE COURT: WELL, I'LL—I WON'T DECIDE THAT IN ADVANCE, BECAUSE I HAVEN'T GOT YOUR QUESTIONS IN MIND.

MR. GLAESSNER: THANK YOU.

THE COURT: WE'LL DEAL WITH THAT WHEN THAT COMES UP.

MR. GLAESSNER: THANK YOU, YOUR HONOR.

DECISION OF THE UNITED STATES DISTRICT COURT, SEPTEMBER 22, 1994

THE COURT: NOW, CAMPBELL'S MOTIONS IN LIMINE.

* * * *

THE MOTION TO PRECLUDE THE USE OF THE TERM "FAKE LETTERS," DENIED. THAT'S DENIED BECAUSE THE ATTORNEYS WAIVED THE OBJECTION AT THE DEPOSITIONS, AND THE EVIDENCE ISN'T SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE. THE PLAINTIFF, OF COURSE, IS GOING TO HAVE TO PROVE BY ADMISSIBLE EVIDENCE THAT THE LETTERS WERE ACTUALLY FABRICATED, AND I TAKE IT THAT'S QUITE A JOB.

TWELVE, THE MOTION TO PRECLUDE THE USE OF THE TERMS "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN," DENIED FOR THE SAME REASONS IN THE PRIOR MOTION.

DECISION OF THE UNITED STATES DISTRICT COURT, FILED SEPTEMBER 20, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember,	No. C-93-1297 WHO MEMORANDUM DECISION AND ORDER

In this action brought by Rita Ellen Hardin ("Hardin"), formerly the City Manager of the City of Concord, against the City of Concord ("City") and its former Mayor Byron Campbell ("Campbell") charging *inter alia* sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, *et seq.*, the City and Campbell filed motions for summary judgment and judgment on the pleadings. The Court, having considered the pleadings and having had the benefit of oral argument, DENIES the City's motion for summary judgment as to Hardin's Title VII claim against the City, GRANTS (1) the City's motion for summary judgment as to Hardin's claim against the City for punitive damages, (2) Campbell's motion for judgment on the pleadings as to Hardin's Title VII claim for monetary damages based upon her sixth and seventh causes of action which charge intentional and/or negligent misrepresentation, respectively, and (3) her eighth cause of action charging interference with her contractual relations with the City. The Court further

DENIES the City's and Campbell's motions to dismiss Hardin's pendent state claims.

I.

Hardin was appointed to the position of City Manager for the City in June 1990. In October 1992, her employment was terminated. She claims that the termination resulted from a course of discriminatory and retaliatory conduct by the City and Campbell. Campbell served as both Mayor and a member of the City Council during Hardin's tenure. Additionally, in his role as mayor, Campbell was Hardin's direct supervisor.

Hardin alleges that the discrimination and retaliation to which she was subjected was prompted by her decision to investigate claims of other City employees concerning sexual harassment by Campbell. She further alleges that the City failed to respond appropriately to her allegations against Campbell. On April 12, 1993, Hardin filed her complaint with the Court alleging nine causes of action against the City a[illegible] Campbell.[1]

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[1]Hardin's nine causes of action are for: (1) violation of civil rights; sexual harassment; sexual discrimination; retaliation (against both defendants); (2) breach of written contract (against the City); (3) breach of implied covenant of good faith and fair dealing (against the City); (4) wrongful and constructive discharge (against the City); (5) defamation (against Campbell); (6) intentional misrepresentation (against both defendants); (7) negligent misrepresentation (against both defendants); (8) intentional interference with contractual relations (against Campbell); and (9) assault and battery (against Campbell).

In her opposition papers, Hardin "suggests" that she be allowed leave to amend her complaint under Rule 15(c) of the Federal Rules of Civil Procedure to add three new claims. These include a claim against the City under 42 U.S.C. § 1983; a claim against Campbell under Title VII 42 U.S.C. § 2000e for injunctive relief; and "collateral" claims under her sixth and seventh causes of action against Campbell for negligent or intentional misrepresentation. Each claim raises a different set of factual issues and is subject to a different set of defenses. The need for a new response, further discovery and dispositive motions would inevitably delay the trial date further. For these reasons, and those stated at the hearing, the Court refuses to recognize Hardin's "suggestion" that

(continued . . .)

Campbell denies that he harassed Hardin. He maintains that his alleged conflicts with her were based on disputes that they had concerning their respective roles and decision-making powers. Campbell has also asserted a claim for indemnification against the City. In its defense, the City maintains that, contrary to Hardin's allegations, it took appropriate remedial steps to eliminate the hostile work environment of which she complained. Further, against Campbell, the City asserts that, if Campbell is liable, the City cannot be held liable because Campbell's acts were outside of the scope of his employment.

II.

The Court deals *seriatim* with each motion.

A. The City's Motion for Summary Judgment on Hardin's Title VII Claim Against It.

1.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court's 1986 "trilogy" of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that a party seeking summary judgment identify evidence that shows the absence of a genuine issue of material fact. Once the moving party has made this showing, the nonmoving

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(. . . continued)
she be granted leave to amend her complaint.

party must "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted).

2.

The gravamen of the City's summary judgment motion with respect to Hardin's Title VII claim is that in her former capacity as City Manager, she was an appointee on the policymaking level, and is, therefore, exempt from Title VII's protective mandates. The pertinent exemption to Title VII provides in part:

> the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f) (West Supp. 1994) (emphasis added).

To determine whether Hardin is barred from pursuing a Title VII cause of action against the City because she falls within the § 2000e(f) exemption, the Court must address two issues. First, the Court must decide whether Hardin was "an appointee on the policymaking level." Second, the Court must consider whether Hardin was exempt from the City's

civil service laws. Before the Court can determine that Hardin is exempt from Title VII under the terms of § 2000e(f), both conditions must be met. § 2000e(f).

First, the Court must determine the facts and circumstances of the employment relationship between the complaining official and the elected officials and, second, examine the evidence presented as to the complaining official's level of authority and scope of duties. § 2000e(f).

(a).

Hardin meets the first requirement for exemption under Title VII because she, as City Manager, was a "policymaker" for the purposes of Title VII. § 2000e(f). Her argument that the City Council had the ultimate authority to adopt or reject her policy recommendations is not dispositive. The language of the exemption is carefully worded to apply to either a person, "elected to public office . . . *or* an appointee on the policy making level." § 2000e(f) (emphasis added).

Hardin had significant responsibilities as City Manager, including formulating specific policies and implementing general policy directives of the City Council as well as drafting policy proposals and advising the City Council. Among other things, she was engaged in preparing a 1991 strategic plan for the City (Decl. of Steve Jepsen, filed July 6, 1994, Ex. A); providing the City Council with cutback solutions during Council meetings in June 1991, July 1991, August 1991, September 1991, January 1992, and February 1992; developing a Budget Reduction Committee to formulate cooperative solutions using labor and management working together; developing a down-sized organization and a plan to bring the City's budget into balance; creating an Early Retirement Program; mitigating layoffs via transfers and placements; and achieving the City's Affirmative Action goals. (Decl. of Richard Whitmore, filed July 6, 1994, Ex. E.) The fact that the City Council was ultimately responsible for the policies of the City does not mean that Hardin was not a policymaker under § 2000e(f).

"[P]olicymaking is not a zero-sum game. The exercise by the [City Council] of extensive policymaking power does not preclude, and is in fact complementary to, the concurrent exercise of wideranging policymaking authority by the [City Manager] as the highest appointed official of the [City]." *EEOC v. Board of Trustees of Wayne County Community College*, 723 F.2d 509, 511 (6th Cir. 1983) (community college president is policymaker even though Michigan law provides that policies of community colleges are to be determined solely by the Board of Trustees).

Many courts, in interpreting § 2000e(f) and its counterpart provision under the Age Discrimination in Employment Act ("ADEA"),[2] have found that appointed individuals with fewer responsibilities than Concord's City Manager are policymakers. *See, e.g., Ramirez v. San Mateo County District Attorney's Office*, 639 F.2d 509 (9th Cir. 1981); (deputy district attorney); Gregory v. Ashcroft, 501 U.S.. 452 (1991) (state judge); *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981) (undersheriff); *Heck v. City of Freeport*, 985 F.2d 305, 310 (7th. Cir. 1993) (city's general inspector); *Board of Trustees of Wayne County Community College*, 723 F.2d at 509 (community college president).

In addition, the Equal Employment Opportunity Commission ("EEOC") determined that a city commissioner of the Department of Administrative Services (who was effectively a department head) was a "policymaker" for the purposes of Title VII. Decision No. 79-8, 1978 WL 5829 (EEOC). The EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need only be reasonable to be entitled to deference. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). If a department

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[2]The identical exemption for policy makers under the ADEA is set forth at 29 U.S.C. § 630(f) (1985). Title VII's and the ADEA's identical and complementary provisions exempting local and state officials are to be construed consistently. *Monce v. City of San Diego*, 895 F-2d 560, 561 (9th Cir. 1990).

head falls under the exemption, then the office of City Manager should fall under the exemption as well because, as City Manager, Hardin supervised department heads.

Because Hardin exercised significant policymaking functions as City Manager, the Court finds that she was "an appointee on the policymaking level" under Title VII. Next, the Court must determine whether Hardin was subject to the civil service laws of the City.

(b).

The City maintains that its civil service laws did not apply to Hardin because, as City Manager, she was a member of the City's "Exempt Service." A review of all of the interlocking provisions of the City's civil service laws reveals, however, that the City is incorrect. Hardin's status simply removed her from the coverage of some of the civil service laws, but left her protected by others.

Confusion concerning whether the City Manager is or is not subject to the City's civil service ordinances arises from the language of Concord Municipal Code, Article XI, Chapter 3, section 11304B pertaining to "Employment with the City." Code section 11304B provides:

> The provisions of this chapter, Personnel Rules, Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters shall apply to all offices, employments, and positions in the service of the city, *except those in the Exempt Service*. However, the provisions of this chapter, Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays *shall apply to all full-time exempt Positions, except for those in special positions*. Further, that those appointed to full time exempt positions may participate in promo-

> tional examinations as provided by the Personnel Rules . . . . *Also, the provisions of Section 11311* [pertaining to prohibitions on political activity] *shall apply to all but elective offices.*

(Decl. of Laura V. Best, filed July 21, 1994, Ex. K, Concord Municipal Code Article XI, Chapter 3, § 11304(B) (emphasis added).)[3]

The City argues that Hardin, as a member of the "Exempt Service" is not subject to Concord's civil service laws and, thus, falls under the Title VII exemption. All members of the "Exempt Service," however, are not treated identically. "Exempt Service" is one of two general categories of City employees, the other being the "Competitive Service." The general category of "Exempt Service" is further broken down into three subcategories:

1. Elective Offices:
    a. City Clerk;
    b. City Treasurer.
2. Appointive positions:
    a. *City Manager*, Chief of Police, and their secretaries;
    b. City Attorney, Assistant City Attorney, any Deputy City Attorney, and Executive Secretary-City Attorney;
    c. All heads of departments;
    d. Deputy City Treasurer;
    e. Project positions (positions created for projects funded entirely or in part by grants made to the City);
    f. Purchasing Agent.
3. special positions:
    a. Members of appointive boards, commissions, and committees;

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[3]All sections of Article XI, Chapter 3 of the Concord Municipal Code are hereinafter referred to as "Code §" and can be found in Exhibit K to the Best Declaration unless otherwise noted.

b. Persons engaged under contract to supply expert, professional, or technical services for a definite period of time;

c. Voluntary personnel who receive no regular compensation from the City.

Code § 11304A (emphasis added).

As City Manager, Hardin was a member of the "Exempt Service" in the "appointive positions" category. Therefore, under the plain language of § 11304(B), Hardin is subject to "the provisions of [Chapter 3] Personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays" because these "apply to all full-time exempt positions, except for those in special positions." Code § 11304B.

Moreover, Hardin also falls under the City's definition of "employee." Code § 11301. This definition, like § 11304B, also distinguishes between employees in each of the "Exempt Service" subcategories. Code § 11304B. "Employee" is defined to include "*appointive officers* and those employed by the City of Concord, but does not include *elected officers* or those persons assigned to *special positions* in the Exempt Service-" § 11301. As a full-time employee under § 11301 Hardin is also afforded protection under the City's anti-discrimination laws. Code § 11302.

The City argues that if the Court finds that Hardin is subject to its civil service laws, then the "Exempt Service" provision is meaningless. As discussed above, however, the law is carefully crafted to include Hardin in portions of the civil service system. To remove an employee from the protections of Title VII it is necessary that the employee be both a policymaker and be exempt from the City's civil service laws. § 2000e(f). Because Hardin is not exempt from the civil service system, she may bring a Title VII claim against the City and, therefore, the Court DENIES the City's motion for summary judgment.

B. The City's Motion for Summary Judgment on Hardin's Claim for Punitive Damages.

Hardin seeks unspecified punitive damages from the City for violation of Title VII, the California Fair Employment and Housing Act, tortious breach of contract, and wrongful discharge. A plaintiff, however, is precluded from recovering punitive damages from the City due to its public entity status.

The Supreme Court has held that punitive damages may not be assessed against public entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Accordingly, the Court GRANTS the City's motion for summary judgment.

C. Campbell's Motion for Judgment on the Pleadings on Hardin's First Cause of Action Against Campbell for Monetary Damages Under Title VII.

Campbell, as an individual, cannot be held individually liable for monetary damages under Title VII. This Court in *Sattar v. Unocal Corp.*, 829 F. Supp. 332 (N.D. Cal. 1993), and the subsequent Ninth Circuit case of *Miller v. Maxwell's International Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 224 S. Ct. 1049 (1994), established that managerial and/or supervisory employees cannot be held individually liable for alleged violations under Title VII. Accordingly, the Court GRANTS Campbell's motion for judgment on the pleadings.[4]

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[4]Hardin, in her opposition, expressly conceded that "[d]efendant Campbell cannot be held individually liable for monetary damages under Title VII." Plf.'s Mem. P. & A., filed July 21, 1994, at 8:24-25.

D. Campbell's Motion for Judgment on the Pleadings on Hardin's Sixth and Seventh Causes of Action Against Campbell for Intentional and/or Negligent Misrepresentation.

Campbell moves for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure on Hardin's sixth and seventh causes of action alleging intentional and/or negligent misrepresentation.[5] Based on the nature of Hardin's claims, Campbell argues that Hardin may only pursue a cause of action under a theory of breach of contract, not tortious misrepresentation. Under California law, a tort arising out of an employment relationship may only exist when the plaintiff's alleged damages do not result from the termination itself. *Hunter v. Up-Right Inc.*, 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 9 (1993) (citing *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988)). This is because the employer-employee relationship is fundamentally contractual. *Hunter*, 6 Cal. 4th at 1180, 26 Cal. Rptr. 2d at 10.

Hardin asserts that her misrepresentation claims are unrelated to her termination. Hardin's allegations of misrepresentation can generally be separated into two categories. First, Hardin asserts that Campbell knowingly or negligently made false representations of continued employment and that she was denied pay increases while employed. Both, if true, constitute unperformed contractual promises by the City.

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[5]The elements for a cause of action for negligent misrepresentation include a representation as to a material fact made by the defendant; that the representation was untrue; that the defendant made the representation without any reasonable ground for believing it to be true; the representation was made with the intent to induce the plaintiff to rely on it; the plaintiff was unaware of the falsity of the representation; actual and justified reliance by the plaintiff; and that the plaintiff sustained damages as a result of his reliance. *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 402, 264 Cal. Rptr. 779, 784 (1989). The absence of any one of these required elements will preclude recovery as a matter of law. *Gonzalez v. Hodgson*, 38 Cal. 2d 91, 101 (1951).

Under *Foley*, these first claims are recoverable only under theories of breach of contract, not under theories of tortious conduct. *Foley*, 47 Cal. 3d 654, 254 Cal. Rptr. 211.

Hardin's second category of allegations amount to the assertion that Campbell "induced" her into an employment contract as City Manager by misrepresenting the terms and conditions of her employment. Specifically, Hardin alleges that she was induced into an employment relationship that caused her to suffer injuries in the form of being subjected to a hostile and discriminatory work environment.

Hardin argues that neither *Hunter* nor *Foley* explicitly prohibit actions based on alleged misrepresentations aimed at "inducing" an employment relationship. *Hunter*, 6 Cal. 4th at 1185, 26 Cal. Rptr. 2d at 14. Hardin relies on the following language in Hunter: "a misrepresentation *not* aimed at effecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a basis for a valid fraud claim even in the context of a wrongful termination." 6 Cal. 4th at 1185, 26 Cal. Rptr. 2d at 14. Hardin, however, fails to cite subsequent language in *Hunter* that states that the detrimental reliance must be related to conditions "collateral to the employment contract itself." *Id.* (citing *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 509-510 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (employees who entered settlement agreement with employer, giving up right to sue under Title VII, and were soon thereafter laid off may bring fraud cause of action against employer).

Hardin does not argue that she was "induced" to apply for the position of City Manager because of a negligent promise by Campbell of a significant change in the benefits or privileges afforded to the City Manager. In effect, Hardin argues that the contract she entered into as City Manager was breached when Campbell allegedly created a hostile and discriminatory work environment. These allegations, if true, only amount to a claim for breach of contract, because any detrimental reliance on her part was not collateral to the

employment contract itself. As such these allegations are no different from Hardin's first set of claims and thus she may not recover in tort. Therefore, the Court GRANTS Campbell's motion for judgment on the pleadings as to Hardin's sixth and seventh causes of action.

E. Campbell's Motion for Judgment on the Pleadings as to Hardin's Eighth Cause of Action for Interference With Hardin's Contractual Relations.

While California recognizes a cause of action against noncontracting parties or strangers to a contract who interfere with the performance of a contract, a contracting party owes no general duty to another not to interfere with performance of the contract. *Shoemaker v. Myers*, 52 Cal. 3d 1, 24-25, 276 Cal. Rptr. 303, 318 (1990). The tort duty not to interfere with the contract falls only on strangers or "interlopers" who have no legitimate interest in the scope or course of the contract's performance. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514, 28 Cal. Rptr. 2d 475, 480 (1994). Only a breach of contract claim may be stated against a breaching party. *Id.* at 516-17, 28 Cal. Rptr. 2d at 482.

Campbell was signatory to Hardin's employment contract as an agent of the City when the parties agreed on the contract. Campbell, as Mayor and a member of the City Council, was neither an outsider nor an interloper to the contract. He had an interest in the scope or course of the contract's performance. Further, even if Campbell acted in his individual capacity to interfere with Hardin's contract with the City, "[a] party may breach a contract . . . because of personal, racial, or ethnic animus, or for other nefarious or unethical reasons . . . . [M]otivation is irrelevant." *Id.* Because Campbell was a party to the contract, Hardin may not pursue her claim against him for interference with contractual relations, and the Court GRANTS Campbell's

motion for judgment on the pleadings as to the eighth cause of action.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. The City's motion for summary judgment as to Hardin's Title VII claims against the City is DENIED.

2. The City's motion for summary judgment as to Hardin's claim against the City for punitive damages is GRANTED.

3. Campbell's motion for judgment on the pleadings as to Hardin's Title VII claim for monetary damages is GRANTED.

4. Campbell's motion for judgment on the pleadings as to Hardin's sixth and seventh causes of action for intentional and/or negligent misrepresentation is GRANTED.

5. Campbell's motion for judgment on the pleadings as to Hardin's eighth cause of action for interference with Hardin's contractual relations with the City is GRANTED;

6. The City's and Campbell's motion to dismiss Hardin's pendent state claims is DENIED.

7. The following claims remain for trial:

a. *Hardin v. Campbell*:

(1) First cause of action for violation of Hardin's civil rights under California's Fair Employment and Housing Act ("FEHA").

(2) Fifth cause of action for defamation; and

(3) Ninth cause of action for assault and battery.

b. *Hardin v. City*:

(1) First cause of action for violation of Title VII and for violation of Hardin's civil rights under FEHA.

(2) Second cause of action for breach of contract.

(3) Third cause of action for breach of the implied covenant of good faith and fair dealing.

(4) Fourth cause of action for wrongful and constructive discharge.

(5) Sixth cause of action for intentional misrepresentation.

(6) Seventh cause of action for negligent misrepresentation.

c. *Campbell v. City*:

Campbell and the City cross-claim against each other for indemnification. The trial on the cross-claims is a bench trial and is bifurcated.

Dated: September 19, 1994.

/s/
William H. Orrick
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT, FILED AUGUST 31, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD, et al., Defendants.	No. C-93-1297 WHO ORDER

Good cause appearing,

IT IS HEREBY ORDERED that:

1. Defendant City of Concord's motion for partial summary judgment on plaintiff's first cause of action for violation of Title VII is DENIED.

2. Defendant City of Concord's motion for partial summary judgment on plaintiff's claim for punitive damages is GRANTED.

3. Defendant Byron Campbell's motion for partial judgment on the pleadings as to plaintiff's first cause of action for violation of Title VII is GRANTED.

Plaintiff, Rita Ellen Hardin, argues that Campbell can still be held liable for injunctive relief under Title VII, but Hardin did not assert a claim for injunctive relief in her original complaint. She left the employ of the City on September 2, 1992, and Campbell is no longer Mayor. Were Hardin permitted to amend her complaint at this late date only four weeks before trial, she would unfairly prejudice

Campbell's position because additional discovery would surely have to take place.

4. Defendant Campbell's motion for partial judgment on the pleadings as to plaintiff's sixth and seventh causes of action for intentional and negligent misrepresentation is GRANTED.

Although the Court granted Campbell's motion for judgment the pleadings, it DENIES Hardin's proposed motion to amend the complaint to add other claims "collateral" to her employment contract that induced her to accept employment as City Manager for the reason that it is too late in the day with trial only four weeks away to no assert new claims that would sure entail further discovery and postponement of trial.

5. Defendant Campbell's motion for partial judgment on the pleadings as to plaintiff's eighth cause of action for intentional interference with contractual relations is GRANTED.

6. The City of Concord and Campbell's motion to dismiss Hardin's pendent state claims is DENIED.

The Court will issue a Memorandum Decision and Order shortly.

Dated: August 31, 1994.

/s/
William H. Orrick
United States District Judge

DECISION OF THE NINTH CIRCUIT, FILED DECEMBER 7, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEIL S. HARDIN, Administration of Rita Ellen Hardin's estate, Plaintiff-Appellee, v. CITY OF CONCORD, Defendant-Appellant.	No. 96-16213 D.C. NO. CV 93-1297 WHO ORDER

Before: T.G. NELSON, THOMAS and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDGMENT OF THE UNITED STATES DISTRICT COURT, FILED MAY 8, 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, vs. CITY OF CONCORD; BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants.	No. C-93-1297 WHO JUDGMENT ON JURY VERDICT AGAINST DEFENDANT CITY OF CONCORD

This action came on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that:

1. Defendant Byron Campbell's actions created a hostile or abusive working environment for plaintiff Rita Hardin based on her sex.

2. Defendant Byron Campbell was an agent of defendant City of Concord, or defendant Campbell was plaintiff's supervisor.

3. Defendant City of Concord knew or should have known of the conduct by defendant Byron Campbell and failed to take immediate and appropriate corrective action.

4. Plaintiff opposed alleged sexual harassment.

5. Defendant City of Concord thereafter took adverse employment action against plaintiff.

6. The adverse employment action was caused by plaintiff's opposition to alleged sexual harassment.

7. Defendant City of Concord would not have taken the same adverse employment action concerning plaintiff even if an unlawful retaliatory motive were not present.

8. Plaintiff was wrongfully constructively terminated by defendant City of Concord.

9. Plaintiff's economic damages attributable to her claims are six hundred thirty-one thousand dollars ($631,000).

10. Plaintiff's noneconomic damages attributable to her claims are six hundred thousand dollars ($600,000).

Dated: May 8, 1996.

/s/
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, ET AL., Plaintiff.	No: C 93 1297 WHO MRS. HARDIN'S RESPONSE TO DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE REGARDING LETTERS CRITICAL OF MRS. HARDIN OTHER THAN STIPULATION ADOPTED IN PRIOR TRIAL Trial Date: November 13, 1995 Pretrial Conference: November 2, 1995, 2:00 p.m. Judge: Hon. William H. Orrick
AND RELATED CROSS-CLAIM.	

Plaintiff Rita Hardin has no opposition to the Court enforcing the terms of the stipulation put in place at the first trial, but wants to ensure that all parties have the same understanding of the scope of the stipulation.

At the first trial, Mrs. Hardin sought to introduce a package of newspaper articles and letters—written both before and after the publication of the Kay and Stevens report—that were critical of Mrs. Hardin. All but a very small number of the critical letters were written after the Kay and Stevens report. After reviewing the letters, the Court indicated its intention not to admit all of the letters but agreed to admit three letters, chosen by the parties or at random by the Court to be received in evidence as representative of all of the letters. The Court also agreed to receive in evidence the comparative number of the letters written before and after the publication of the Kay Stevens report and agreed that Mrs. Hardin's counsel could "cross-examine Mr. Campbell on his awareness of the breadth of the letters . . . and whether he had a relationship to the people who wrote the letters. (4 RT 2-6.)[1]

Thereafter, all parties, through their counsel, agreed to a two-part stipulation regarding the letters and newspaper articles critical of Mrs. Hardin. A copy of the full stipulation is attached as Exhibit 1. Part one of the stipulation consisted of a fact stipulation to be read to the jury the second part, concerning the scope of examination with other witnesses provided:

None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed at trial. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims by unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any questions regarding the authenticity of the letters or the relationship of the letter-writers to Byron Campbell.

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[1]See Exhibit A, Declaration of Sandra D. Peterson in Support of Plaintiff s Opposition to Campbell's Motion in Limine No. 33.

Mrs. Hardin agrees that this stipulation should be followed at the retrial.

Mrs. Hardin wants to confirm, however, that pursuant to the stipulation she will be able to examine other witnesses on the subject of the letters relating to her claims of unlawful harassment and retaliation by defendants in the spring of 1992. Moreover, Mrs. Hardin is entitled, pursuant to the stipulation, to question Byron and others about statements in newspaper articles that were attributed to him.

Dated: October 21, 1995

Respectfully submitted,

LINDA E. SHOSTAK
MARK R. McDDONALD
SANDRA D. PETERSON
MORRISON & FOERSTER

By: /s/
Sandra D. Peterson
Attorneys for Plaintiff
RITA ELLEN HARDIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE RE: LETTERS CRITICAL OF PLAINTIFF OTHER THAN STIPULATION ADOPTED AT PRIOR TRIAL
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Trial Date: November 13, 1995 Pretrial Conf: November 2, 1995 2:00 p.m. Judge: Honorable William H. Orrick

Defendant City hereby joins in Defendant Campbell's Motion in Limine No. 33 to Exclude All Evidence Re: Letters Critical of Plaintiff Other Than Stipulation Adopted at Prior Trial. Defendant City adopts by reference all pleadings

and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: October 25, 1995

Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
KATHRYN J. BURKE
NANCY J. CLARK
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	Case No: C-93-1297 WHO DEFENDANT CAMPBELL'S MOTION IN LIMINE NO. 33 TO EXCLUDE ALL EVIDENCE REGARDING LETTERS CRITICAL OF PLAINTIFF OTHER THAN STIPULATION ADOPTED IN PRIOR TRIAL
AND RELATED CROSS-ACTIONS	Pre-Trial Conference: November 2, 1995 Trial: November 13, 1995

INTRODUCTION

Defendant Byron Campbell (Campbell) hereby moves in limine for an order precluding the admission of any evidence, or comment by counsel regarding Defendant Campbell's alleged participation in a hostile letter writing campaign in the second trial beyond the scope of the stipulation put in place at the prior trial. This action is based upon the following points:

1. Plaintiff has never offered any proof that Mr. Campbell participated in any hostile letter writing campaign. The basis for this allegation in the complaint is her speculation, not admissible evidence;

2. The court, at the first trial of this lawsuit, strongly urged the parties to reach a fact stipulation on this subject. To avoid what would amount to literally a separate trial on this matter, with as many as forty or so witnesses testifying about letters which appeared in local newspapers, the parties reached a fact stipulation attached as Exhibit A hereto;

3. Prior to reaching the stipulation, Ms. Hardin had already testified about the number of negative newspaper articles and letters that appeared in the newspapers after the Kay & Stevens investigation and introduced an exhibit consisting of certain newspaper articles and testified the persons who wrote such letters were Mr. Campbell's "supporters". (*See* Exhibit 3 hereto.)

4. Defendant Campbell reasonably believed in preparation of his trial witness and exhibit list that such issues would be dealt with in this trial as they had in the prior trial. Plaintiff's attorney though informed his counsel on October 4, 1995 that she was not prepared to utilize the prior stipulation (or at least as of that date was not prepared to agree to it), and thus the issue of how all of this evidence will be handled is again in flux and must be resolved prior to the commencement of the second trial.

ARGUMENT

I.

THE PRIOR STIPULATION SHOULD BE BINDING UPON THE PARTIES IN ANY SUBSEQUENT TRIAL.

Use of stipulations is encouraged by the courts as a means of making efficient use of trial time. *People v. Morris* (1991) 53 Cal.3d 152, 190, 279 Cal. Rptr. 720,740. The use of stipulations is especially important in situations such as this one in which the court intends to fix time limits for the parties to present their case.

It is well established law that a party is bound by a stipulation made in a prior trial in a subsequent trial, unless

the court permits withdrawal of the stipulation. *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal-2nd 749,755, 214 Pac.2d 809, 812; See also California Practice Guide, Civil Trials and Evidence, Section 8.984, Rutter Group (1995). Plaintiff may not unilaterally withdraw from the stipulation. She may apply to the court for leave to withdraw from it, subject to a showing of justification, *i.e.* an offer of proof, as to why there is a justification for withdrawal of the stipulation. There has been no such motion made, and without an order granting relief from the previous stipulation, the prior stipulation remains binding.

II.

THE EFFECT OF THE STIPULATION ON THE ADMISSIBILITY OF OTHER EVIDENCE RELATING TO LETTER WRITING.

The court may recall that at the first trial the stipulation regarding letter writing was not reached until after Ms. Hardin had completed her testimony. During the course of her direct examination she testified in some detail about "negative" newspaper articles and letters that appeared in local newspapers. She assails Mr. Campbell's "supporters" as being behind the letter writing campaign. (*See* Exhibit B.) It was only because the stipulation had not been reached that such testimony was admissible. The court later precluded Mr. Campbell from rebuttal testimony because the stipulation was negotiated by the time of testimony. The sequence of witnesses in the prior trial allowed Ms. Hardin a "free shot" at Mr. Campbell on this issue because Mr. Campbell testified after the stipulation was arrived at. Moreover, after the stipulation was arrived at and read to the Jury, Mr. Campbell did not ask that Ms. Hardin's earlier testimony be stricken because he did not wish to draw an undue attention to it. The stipulation reached greatly limited the scope of other evidence as follows:

> None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed at trial. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any questions regarding the authenticity of the letters or the relationship of the letter writers to Byron Campbell.

The stipulation expressly excludes other evidence on "the relationship of the letter writers to Mr. Campbell". If the stipulation had been reached prior to Ms. Hardin's testimony about the number of newspaper articles and letters and Mr. Campbell's "supporters" writing such letters, such testimony would have been properly excluded under the stipulation. Defendant Campbell therefore submits that such testimony must be excluded at the second trial based upon the terms of the stipulation reached.

III.

IF THE COURT ALLOWS THE STIPULATION TO BE WITHDRAWN, THEN SUPPLEMENTATION OF THE TRIAL EXHIBIT LIST IS APPROPRIATE AND HAS BEEN STIPULATED TO BY PLAINTIFF'S COUNSEL.

Finally, Defendant Campbell's counsel prepared a revised trial exhibit list for this trial in September, 1995 before learning of the possibility that the plaintiff would seek to unilaterally withdraw from the letter writing stipulation. On October 9, 1995 after exchanging witness and exhibit lists, Mr. Glaessner wrote to and spoke with Ms. Shostak about her intentions. Ms. Shostak at that time indicated that she was still considering evidence from the prior trial and her options regarding letter writing stipulation. Mr. Glaessner indicated that if plaintiff's counsel was not agreeing to the

stipulation in the second trial, then it would require the Defendant Campbell to supplement his trial exhibit list by including a number of exhibits withdrawn from the exhibit list in anticipation that all evidence on the authenticity of the letters would be by way of the previously agreed stipulation. However, Ms. Shostak agreed that the defendant should be permitted to supplement the list, and it is expected that the parties will work out the details prior to trial, if necessary.

CONCLUSION

Accordingly, Defendant Campbell requests an order in limine as follows: (1) That the terms of the letter writing stipulation be deemed binding on the parties in the second trial and (2) For the exclusion of any testimony that would be excluded based upon the terms of that stipulation.

DATED: October 18, 1995

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants. And Related Cross-Claim.	No: C 93 1297 WHO STIPULATION RE LETTERS AND NEWSPAPER ARTICLES CRITICAL OF RITA HARDIN

The parties hereby stipulate that the following procedure should be used regarding the newspaper articles and letters critical of Rita Hardin. This stipulation is in two parts. The first part consists of a fact stipulation to be read to the jury. The second part concerns the scope of examination with other witnesses (no letter writers will be called) concerning Mrs. Hardin's claims regarding retaliation in the spring of 1992.

PART I

Before the City Council adopted Resolution 92-16, there were 3 articles of letters critical of Mrs. Hardin which

appeared in newspapers in the first eighteen months of her job as City Manager.

After the resolution, there were 57 letters printed in newspapers critical of the City Manager and/or the City of Concord government between January and June, 1992. In this period, 29 different persons wrote 48 separate letters. Nineteen of these letters were sent to and published in two different newspapers, resulting in a total of 67 letters being published.

There were five newspaper articles which appeared in newspapers critical of the City Manager and/or the City of Concord government between January and June, 1992.

Defendant Byron Campbell was personally acquainted with a number of individuals who wrote some of these letters, through social and political connections. Defendant Byron Campbell would deny, under oath, that he wrote any of the letters in question, or that he encouraged any of the letter writers to write letters critical of plaintiff Rita Hardin. If the letter writers were called to the witness stand, they would deny under oath that defendant Byron Campbell wrote any of the letters in question or were encouraged by him to write such letters. Some of the letters came from persons who did not live in Concord. Two individuals whose names appear in letters deny they write such letters.

PART II

None of the letters or articles critical of plaintiff Rita Hardin will be admitted at trial and none of the letter writers will be subpoenaed as trial witnesses. The parties will be permitted, however, to examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. This examination will not include any

questions regarding the authenticity of the letters or the relationship of the letter writers to Byron Campbell.

Dated: October 17, 1994

LINDA E. SHOSTAK
LAURA V. BEST
SANDRA D. PETERSON
MORRISON & FOERSTER

By /s/
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HARDIN, COOK, LOPER, ENGEL & BERGEZ

By /s/
Peter O. Glaessner
Attorney for Defendant
BYRON CAMPBELL

THE COURT: GOOD MORNING, COUNSEL.

NOW, I READ THE STIPULATION, AND THIS IS GOING TO BE INTRODUCED IN EVIDENCE, AND NOTHING MORE, WITH RESPECT TO THE LETTERS.

MR. GLAESSNER: YOUR HONOR, IF I MAY —

THE COURT: IT'S THE PLAINTIFF FIRST.

MS. SHOSTAK: OKAY. AS I UNDERSTAND FROM WHAT YOUR HONOR WAS TALKING TO US ABOUT LAST WEEK, THE LETTERS—THIS WOULD GO INTO EVIDENCE IN LIEU OF THE ACTUAL LETTERS. I FURTHER UNDERSTOOD FROM LAST WEEK THAT THAT DID NOT BAR US FROM—ME ASKING MR. CAMPBELL ABOUT LETTERS, AND WHETHER HE HAD ANY CONNECTION TO THE LETTERS, OR THE LETTER WRITING. BUT THIS—THIS STIPULATION WOULD SERVE AS A SUBSTITUTE FOR ACTUALLY SUBMITTING THE LETTERS.

THE COURT: ALL RIGHT. THE MINUTE YOU ASK MR. CAMPBELL ABOUT HIS RELATIONSHIPS, HE'S ENTITLED TO CALL ADDITIONAL LETTER WRITERS, AND THAT PUTS US RIGHT BACK AT SQUARE ONE. AND I'M NOT ABOUT TO DO THAT. MR. CAMPBELL IS CONCERNED ABOUT THAT, AND HAS FILED A MEMORANDUM—PERHAPS YOU'VE SEEN IT; I JUST SAW IT A FEW MINUTES AGO—ASKING THAT MR. CAMPBELL HAVE PERMISSION TO CALL CERTAIN OF THE LETTER WRITERS HIMSELF. AND AGAIN, I HAVE NO INTENTION OF GRANTING THAT; THAT TAKES US RIGHT BACK TO SQUARE ONE, AND THAT'S THE REASON THAT I KEPT THOSE LETTERS OUT. THE MINUTE I PERMIT THAT KIND OF TESTIMONY, WE'RE GOING TO HAVE, PROPERLY SO, TESTIMONY FROM OTHER LETTER

WRITERS, WHO'LL BE CALLED BY THE PLAINTIFF, AND I'VE RULED THAT OUT.

MS. SHOSTAK: YOUR HONOR, LAST WEEK YOU WERE ALSO TALKING ABOUT THE POSSIBILITY THAT IF WE REACHED THIS KIND OF STIPULATION, YOU WOULD THEN SELECT AT RANDOM THREE LETTERS FROM—FROM THE PILE, AND WE COULD—AS I UNDERSTOOD YOUR HONOR, WE COULD —

THE COURT: YES.

MS. SHOSTAK: —DO WHAT WE WANTED TO WITH RESPECT TO—TO THOSE THREE LETTERS.

THE COURT: YES.

MS. SHOSTAK: SO IT MIGHT BE THAT ONCE YOUR HONOR —

THE COURT: UNLESS YOU WANT TO REST ON THE STIPULATION.

MS. SHOSTAK: WELL, I MAY HAVE MISUNDERSTOOD, YOUR HONOR. I THOUGHT—I THOUGHT I HEARD YOUR HONOR LAST WEEK, THAT, ONE, THERE WOULD BE A STIPULATION AS TO THE NUMBER, AND THEN IF WE REACHED THAT STIPULATION, THEN FROM THAT COLLECTION, YOU WOULD PULL THREE. I MAY HAVE—I MAY HAVE MIS—I MAY HAVE MISUNDERSTOOD.

THE COURT: NO, THAT THAT WAS MY SUGGESTION.

MS. SHOSTAK: OKAY.

THE COURT: I WAS JUST —

MS. SHOSTAK: AND I —

THE COURT:—HOPING THAT YOU WON'T TAKE THE SECOND PART OF THE SUGGESTION, THAT'S ALL.

MS. SHOSTAK: ALL RIGHT. LET'S—LET ME DO THIS, YOUR HONOR. I HAVE NOT READ MR. CAMPBELL'S PAPERS. WE HAD AGREED BEFORE YOU CAME OUT THAT WHAT WE WOULD

DO IS WE WOULD DEFER THIS UNTIL I COULD READ THE PAPERS, AND WE WILL COME TO COURT TOMORROW WITH A CLEAR PROPOSAL, OR A CLEAR POSITION FOR BOTH OF US, AND THEN YOUR HONOR—YOUR HONOR WILL HAVE WHAT YOU NEED TO RULE. YOU ALREADY HAVE, BUT WE'LL—WE'LL GIVE YOU OUR POSITION TOMORROW MORNING. HOW IS THAT?

THE COURT: THAT'S PERFECTLY SATISFACTORY.

MS. SHOSTAK: OKAY.

* * * *

MR. GLAESSNER:—I APOLOGIZE. MAY I GO BACK TO THE ISSUE OF THE STIPULATION FOR ONE MINUTE—

THE COURT: YES.

MR. GLAESSNER: —JUST TO MAKE CLEAR OUR POSITION AT THIS POINT.

THE COURT: YES.

MR. GLAESSNER: OUR POSITION —

THE COURT: COME UP TO THE LECTERN, IF YOU WOULD, PLEASE.

MR. GLAESSNER: YES, YOUR HONOR.

MR. CAMPBELL'S POSITION HAS BEEN THAT THE LETTERS SHOULD NOT COME INTO EVIDENCE AT ALL; WE'VE OBJECTED TO THAT ON GROUNDS OF RELEVANCY AND FOUNDATION. AT YOUR HONOR'S REQUEST AND DIRECTION, WE HAVE PREPARED THE STIPULATION REGARDING THE NUMBER OF LETTERS. I JUST WANT TO MAKE CLEAR FOR THE RECORD, WE'RE NOT WAIVING ANY OF OUR PRIOR OBJECTIONS REGARDING THOSE LETTERS, BUT AT YOUR HONOR'S REQUEST, WE'VE ATTEMPTED TO CRAFT A STIPULATION THAT—THAT MEETS WHAT YOUR HONOR HAS DIRECTED US TO DO. I JUST WANT TO MAKE THAT CLEAR FOR THE RECORD.

I AGREE WITH MS. SHOSTAK THAT THERE ARE OTHER ISSUES THAT WE WILL TRY TO ADDRESS BETWEEN NOW AND TOMORROW REGARDING THE LETTERS, BUT WE BELIEVE, AND CONSISTENT WITH OUR MEMORANDUM, THERE ARE SOME SERIOUS ISSUES HERE, BECAUSE THE JURY'S ALREADY HEARD OF THIS NUMERICAL DISTINCTION BETWEEN THESE LETTERS, AND TO SIMPLY TO LEAVE IT AT THAT, I THINK CREATES A VERY MISLEADING IMPRESSION.

THE COURT: NOW, YOU SAY THAT DURING DIRECT EXAMINATION THE PLAINTIFF RAISED THE ISSUE THAT 74 LETTERS CRITICAL OF HER WERE WRITTEN.

MR. GLAESSNER: THAT'S CORRECT, YOUR HONOR. AND THAT'S WHAT I BELIEVE HAPPENED. THE TESTIMONY WAS THAT THERE WERE THREE LETTERS OR ARTICLES PRIOR TO JANUARY OF 1992, AND 74 THEREAFTER IN A SIX-MONTH PERIOD. AND—AND WHILE CERTAINLY MS. HARDIN GAVE THAT TESTIMONY WITHOUT DIRECT REFERENCE TO THESE LETTERS, THE JURY HAS NOW HEARD THAT NUMERICAL DISTINCTION, AND I DON'T THINK, WITHOUT LETTING THE DEFENSE GO BACK INTO THAT, TO SOME DEGREE, AT LEAST, WITH RESPECT TO THESE LETTER WRITERS, IS EQUITABLE UNDER THE CIRCUMSTANCES. THERE'S A—THERE'S A STIGMA NUMERICALLY THAT'S BEEN CREATED IN THESE JURORS' MINDS ABOUT THAT, EVEN THOUGH THERE'S BEEN NO FOUNDATIONAL SHOWING THAT MY CLIENT HAD ANYTHING TO DO WITH THAT.

THE COURT: ALL RIGHT, MS. SHOSTAK.

MS. SHOSTAK: SIMPLY, YOUR HONOR, I JUST WANT TO MAKE CLEAR ALSO THAT WE HAVE OUR POSITION ABOUT WHAT WE WOULD LIKE TO PUT INTO EVIDENCE, BUT I UNDERSTOOD THAT YOUR

HONOR HAD ALREADY INDICATED THAT WE WERE GOING—NOT GOING TO GET OUR TOTAL WAY, AND SO CONSISTENT WITH WHAT MR. GLAESSNER SAID, THIS DIALOGUE WE'RE HAVING IS IN LIGHT OF THE FACT THAT YOUR HONOR ALREADY HAS MADE SOME PRELIMINARY RULINGS.

THAT'S JUST TO SAY THAT WE WOULD LIKE TO PRESERVE OUR RECORD—OUR POSITION FOR THE RECORD, AS WELL AS, HAVING UNDERSTOOD YOUR HONOR, WE'RE—WE'RE WORKING TOWARDS HOPEFULLY A MIDDLE GROUND THAT WILL BE ACCEPTABLE TO —

THE COURT: WELL, WHY DON'T YOU TRY, IN TRYING TO UNDERSTAND HIS HONOR, SIT DOWN WITH COUNSEL THIS AFTERNOON AND TALK AGAIN ABOUT THE—

MS. SHOSTAK: WE WILL—

THE COURT: —STIPULATION. I DON'T THINK—A STIPULATION IS ONLY AS GOOD AS THE LAWYERS' AGREEMENT TO STIPULATE, AND I DON'T LIKE THE IDEA THAT THE COURT'S FORCING ANYBODY TO STIPULATE TO ANYTHING IN THE CASE. I DON'T MIND RULING ON MATTERS, AND I'LL RULE ON THEM WITH SECTION—FEDERAL EVIDENCE RULE 403 VERY MUCH IN MIND.

MS. SHOSTAK: I UNDERSTOOD THAT, YOUR HONOR. WE WILL DO THAT THIS AFTERNOON. YOUR HONOR.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	Case No: C-93-1297 WHO MOTION IN LIMINE RE: ADMISSIBILITY OF TESTIMONY RE: PLAINTIFF'S CONTENTION THAT CERTAIN LETTERS TO THE EDITOR WERE FABRICATED AND EVIDENCE OF THE RELATIONSHIPS BETWEEN CAMPBELL AND CERTAIN OF THE LETTER WRITERS
AND RELATED CROSS-ACTIONS	

INTRODUCTION

Defendant Byron Campbell ("Campbell") hereby moves the Court, in limine, for an order allowing the defense to question plaintiff Rita Hardin about certain statements she made during her deposition testimony that certain letters to the editor were "fake", not written by the purported authors and that Bryon and Elaine Campbell were involved in the writing of the letters. In addition, defendant Campbell seeks permission from the Court to offer the testimony of the two authors in connection with plaintiff's claim of fabrication to rebut this claim.

The Court ruled on October 6, 1994 that it would not admit the 67 or so letters contained in Exhibit 302, but would randomly select three letters and that those persons might testify only. While recognizing the concern for cumulative evidence, defendant Campbell requests that the Court rule, prior to the completion of plaintiff's cross-examination that he may additionally call two "letter writers" to rebut a claim that their letters were written by defendant Campbell. It is necessary for the Court to address this matter now, so that defendant Campbell knows if this will be permitted *prior* to opening this door in cross-examination.

Finally, defendant Campbell seeks permission to examine plaintiff on cross-examination regarding her understanding of the relationship between Mr. Campbell and certain of the letter writers as plaintiff has opened the door on this issue on direct.

ARGUMENT

During plaintiff's deposition, she provided testimony that she believed that certain of the letters to the editor critical of her were fabricated or not written by the purported authors in connection with her claim of alleged retaliation. Specifically, she stated that a police officer, Dan Siri had told her that some of the letters were "fake" in that his aunt signed a letter under another name (Betty Christensen/Betty Bruno) and that the Campbell's were somehow involved. (*See* pages 460-468 of Plaintiff's deposition, attached hereto as Exhibit A). In addition, plaintiff testified that certain letters written by Jason Wood were fake as she believed that Mr. Wood was a fourteen-year-old not capable of writing such letters. (*See* pages 475-476 of Plaintiff's deposition, attached hereto as Exhibit B).

Defendant Campbell should be allowed to both examine plaintiff on these claims and to be able to then examine rebuttal witnesses on this issue as plaintiff has opened the door to the claim of a hostile letter-writing campaign by

describing in a vague way, the reasons for her belief that there was a campaign against her. The only way to effectively rebut this issue is to discuss the specific claims, such as the "fake" letter issue.

In addition, during direct examination, plaintiff raised the issue that "seventy-four" letters critical of her were written in the relevant time frame and that Mr. Campbell had social or political relationships with many of the authors. The only way defendant Campbell can effectively cross-examine plaintiff on this issue is by asking specific questions about plaintiff's understanding of defendant Campbell's relationships with certain of the authors. This would require defendant Campbell to identify the names of the authors and represent that fact to the jury, so that they understand the significance of the question. Because the letters themselves are not in evidence, defendant Campbell requests that the Court permit counsel to identify such persons as shown as the authors in Exhibit 302 for purposes of this examination.

Plaintiff opened the door on this issue on direct examination referring to these persons as Campbell's "supporters". Defendant Campbell requests that he be allowed to identify these persons by name during the cross-examination of plaintiff despite the fact that the letters themselves have not been admitted into evidence.

CONCLUSION

Based upon the foregoing, defendant Campbell moves the Court to allow the brief examination of plaintiff regarding her contention that certain letters to the editor were fabricated and to allow defendant Campbell to offer the testimony of the two authors to rebut this claim. Furthermore, defendant Campbell seeks permission from the Court to cross-examine plaintiff on her understanding of

defendant Campbell's relationship with certain of the authors for the reasons stated above.

DATED: October 11, 1994

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
GAYLYNN R. KIRN

MS. SHOSTAK: YOUR HONOR, WE DO HAVE ANOTHER ISSUE, AND THAT IS THE ISSUE OF THAT—THAT GROUP NEWSPAPER EXHIBIT YESTERDAY. ONE OF THE EXHIBITS, 220.93, I THINK HAS ALREADY COME INTO EVIDENCE, AND THAT'S THE SMALL EXHIBIT, THE EXHIBIT THAT CONSISTS OF THREE ARTICLES.

WE GOT DERAILED ON THE—ON THE LARGER EXHIBIT. COUNSEL NOW HAS THE LARGER EXHIBIT; WE HAVE LABELED IT A NEW NUMBER, 302, THOUGH IT CONSISTS OF—OF ARTICLES THAT THE PARTIES HAVE ALREADY SEEN.

I BELIEVE IT IS THE CASE THAT THE CITY OF CONCORD HAS NO OBJECTION TO 302, BUT MR. GLAESSNER DOES HAVE OBJECTIONS TO 302, SO I THINK THAT IT PROBABLY WOULD MAKE SENSE TO TALK ABOUT THAT NOW.

THE COURT: WELL, IS MY—IS MY PACKAGE—

MS. SHOSTAK: YOUR PACKAGE—YOUR PACKAGE IS THE CORRECT PACKAGE; WE'RE JUST NOW CALLING IT 302.

THE COURT: ALL RIGHT. AND SO—AND MR. CAMPBELL OBJECTS TO ALL OF IT OR PART OF IT?

MR. GLAESSNER: WE OBJECT TO ALL OF IT, BUT FOR SOMEWHAT DIFFERENT REASONS, YOUR HONOR. THE PACKAGE MARKED 302 NOW CONTAINS TWO NEWSPAPER ARTICLES, ONE FROM THE SAN FRANCISCO CHRONICLE AND THE OTHER FROM THE CONTRA COSTA TIMES, AND THEN IT CONSISTS OF A SERIES OF APPROXIMATELY 60 PAGES OF—OF LETTERS.

THE BASIS FOR THE OBJECTION IS DECIDEDLY DIFFERENT, AND I—I THINK AT LEAST WOULD WARRANT HAVING THEM MARKED SEPARATELY,

SO THAT I CAN MAKE THE OBJECTIONS FOR THE RECORD SEPARATELY.

MY OBJECTION AS TO THE NEWSPAPER ARTICLES VERY SIMPLY IS THIS, YOUR HONOR: WHILE I UNDERSTAND THAT MS. SHOSTAK IS OFFERING THE ARTICLES NOT FOR THE TRUTH OF THE MATTER, I BELIEVE THAT THERE ARE MANY STATEMENTS IN THESE ARTICLES WHICH ARE HEARSAY AND WHICH WOULD POSE A GREAT DANGER OF PREJUDICE TO MR. CAMPBELL IN THIS CASE. THE OBJECTIONS ARE REALLY BASED UPON RULE 403, MORE THAN A HEARSAY OBJECTION, ALTHOUGH THERE IS OBVIOUSLY HEARSAY. SO THOSE ARE THE OBJECTIONS AS TO THE TWO NEWSPAPER ARTICLES IN EXHIBIT 302.

AS TO THE LETTERS, THE OBJECTIONS HAVE TO DO WITH THE FACT THAT, WITHOUT FOUNDATION, MR. CAMPBELL REQUESTED THESE PEOPLE TO WRITE THESE LETTERS; THERE—THERE IS NO RELEVANCY TO THESE LETTERS IN THIS LAWSUIT. PEOPLE WRITE LETTERS ALL THE TIME, AND WE'VE ADDRESSED THAT PREVIOUSLY IN THE MOTIONS. BUT THE OBJECTIONS ARE DECIDEDLY DIFFERENT. I'M CONCERNED THAT IF IT'S OFFERED AS A GROUP EXHIBIT, MY OBJECTIONS ARE GOING TO BE VERY COMPOUND AND CONVOLUTED, REGARDLESS OF WHAT YOUR HONOR ULTIMATELY RULES ON, AND IT'S GOING TO BE VERY DIFFICULT TO—TO PULL THAT APART WHILE THE JURY'S HERE PRESENT.

THE COURT: THAT'S CERTAINLY CORRECT.

MS. SHOSTAK: ON THE MECHANICAL ISSUE, I WOULD HAVE NO PROBLEM WITH TAKING THE TWO NEWSPAPER ARTICLES OUT AND CALLING THEM 302A, SO I DON'T THINK WE HAVE A PROBLEM WITH THAT.

ON THE BIGGER ISSUE OF THE ADMISSIBILITY OF THE PACKET, WE THINK THE PACKET IS RELEVANT FOR TWO REASONS, YOUR HONOR. AND THIS HAD BEEN ADDRESSED TO SOME DEGREE IN THE MOTIONS IN LIMINE.

WE THINK THE INFORMATION—THE LETTERS TO THE EDITOR, LETTERS TO THE CITY COUNCIL, ARE RELEVANT BECAUSE THEY WERE PUBLISHED, THEY WERE IN THE COMMUNITY; MRS. HARDIN TALKED ABOUT THE PUBLICITY SHE WAS RECEIVING WITH THE CITY COUNCILMEMBERS, THEY HAD NOTICE OF IT, SEVERAL OF THEM SAID THEY THOUGHT THAT BYRON WAS BEHIND IT, AND YET THEY DID NOTHING.

SO THEY'RE NOT BEING OFFERED FOR THE TRUTH. GOODNESS KNOWS, WE DON'T WANT TO OFFER THEM FOR THE TRUTH; THEY'RE VERY CRITICAL OF MRS. HARDIN. THEY'RE OFFERED FOR THE FACT THAT THEY WERE PUBLISHED IN THE COMMUNITY AT THE TIME, "A PROBLEM AT CITY HALL." ALL RIGHT. THAT IS WITH RESPECT TO CONCORD.

WITH RESPECT TO MAYOR CAMPBELL, WE HAVE A CIRCUMSTANTIAL CASE THAT HE MAY HAVE INSPIRED THIS LETTER WRITING CAMPAIGN. AND SO THE FACT THAT THERE WERE THREE BEFORE THE RESOLUTION, AND THERE WERE 70 PLUS AFTER THE RESOLUTION, IS OUR CIRCUMSTANTIAL CASE. THE PEOPLE WHO WROTE THESE LETTERS ARE ASSOCIATED, VERY MANY OF THEM, WITH HIM IN ONE WAY OR ANOTHER.

SO I WOULD SUBMIT, WITH RESPECT TO MAYOR CAMPBELL, MR. GLAESSNER'S ARGUMENT GOES TO THE WEIGHT, RATHER THAN THE ADMISSIBILITY OF THE ARGUMENT—OF THE ARTICLES, BUT THEY COME IN FOR TWO

DIFFERENT PURPOSES FOR THE TWO DIFFERENT DEFENDANTS.

MR. GLAESSNER: YOUR HONOR, MAY I RESPOND JUST BRIEFLY?

THE COURT: YES.

MR. GLAESSNER: I THINK IN A NORMAL CASE, IN A TYPICAL LAWSUIT, IF I WERE IN MS. SHOSTAK'S POSITION, I'D BE MAKING EXACTLY THE SAME ARGUMENTS ABOUT THESE LETTERS, THAT—THAT IF SHE CAN LAY SOME CIRCUMSTANTIAL PLAN BEFORE YOU, THAT THEY MIGHT SOME WAY COME IN.

THERE'S AN ADDITIONAL PROBLEM IN THIS CASE THAT I—THAT I PERCEIVE, AND THAT IS THIS: ABSENT SOME—SOME FOUNDATIONAL BASIS THAT MR. CAMPBELL EITHER WROTE THESE LETTERS, OR THAT—THAT HE SOLICITED THESE LETTERS TO BE WRITTEN TO LET THE LETTERS COME IN UNDER THE GUISE OF CIRCUMSTANTIAL EVIDENCE IS REALLY, IN MY JUDGMENT, STARTING TO GET VERY CLOSE TO INFRINGEMENT UPON FIRST AMENDMENT RIGHTS, BECAUSE LATER ON, IF NEEDED, THESE PEOPLE WILL COME IN AND EXPLAIN WHAT THEY DID, IN TERMS OF WRITING THESE LETTERS.

BUT THE—THE NOTION THAT BY ASSOCIATION, THAT BY MR. CAMPBELL'S ASSOCIATION WITH THESE PEOPLE, WHICH, IN MANY RESPECTS, WE DON'T DISPUTE, THAT—THAT HE SOMEHOW COULD BE CHARGED IN THIS CASE WITH INSTIGATING A HOSTILE LETTER WRITING CAMPAIGN, I THINK IT VIOLATES MR. CAMPBELL'S FIRST AMENDMENT RIGHTS—I THINK IT ALSO POTENTIALLY VIOLATES THESE OTHER PEOPLES' RIGHTS, BUT IT'S MR. CAMPBELL'S RIGHTS IN THIS CASE THAT ARE AT ISSUE—AND THAT'S THE ADDITIONAL CONCERN ABOUT A

CIRCUMSTANTIAL EVIDENCE CASE WITH THESE LETTERS.

THE COURT: ALL RIGHT. THE MATTER'S UNDER SUBMISSION, AND I'LL DECIDE IT AFTER YOU RENUMBER MY PAGES HERE.

MS. SHOSTAK: MAY I COME UP AND GET THAT, YOUR HONOR?

THE COURT: SALLY, WILL YOU PLEASE HAND THAT TO COUNSEL.

MS. SHOSTAK: YOUR HONOR, IT VERY WELL MAY BE THAT I'LL BE FINISHED WITH MY DIRECT BEFORE YOUR HONOR HAS AN OPPORTUNITY TO RULE, SO I ASSUME THAT WE'LL BE ABLE TO REOPEN FOR THAT PURPOSE —

THE COURT: YES. YES.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, BYRON CAMPBELL, individually, and in his capacity as Mayor of Concord and Concord City Councilmember, Defendants.	No: C 93 1297 WHO PLAINTIFF'S OPPOSITION TO DEFENDANT CAMPBELL'S MOTIONS IN LIMINE NOS. 2-5, 11, 12, AND 18, AND TO DEFENDANT CITY'S MOTION IN LIMINE NO. 8
And Related Cross-Claim.	Trial Date: October 3, 1994 Pretrial Conf: Sept. 22, 1994 2:00 p.m. Judge: Honorable William H. Orrick

I. INTRODUCTION

Defendant Campbell has publicly protested, "I wanted to get everything out in the open. I wanted to get the facts on the table where they could be evaluated in the plain light of the day;" "I'm glad this is all coming out. I tried to get this matter dealt with for the last year. I've heard rumors, and this action of calling this special investigator will provide an opportunity to clear up rumors and allegations against me;" and "I welcome the chance for this entire matter to be heard

in a court of law."[1] Yet, despite these protests, Campbell, by his motions, is now making every effort to suppress the evidence that Mrs. Hardin has discovered in this case that demonstrates that he has harassed and retaliated against her in violation of the anti-discrimination laws of this state.

Campbell attempts to characterize this evidence as hearsay or character evidence. In fact, it is not. Rather, the evidence to which Campbell objects in his Motions Nos. 2-5, 11, 12, and 18 will be offered, not for the truth of the matter asserted or to show character, but rather to prove other elements of Mrs. Hardin's sex discrimination claims: (1) Mrs. Hardin's receipt of complaints of discrimination based on race, sex, and sexual harassment, and retaliation; (2) notice to her employer, the City of Concord, and to Byron Campbell of complaints about Campbell's harassment and retaliation against Mrs. Hardin and others; (3) the City of Concord's failure to investigate and remedy these complaints and its apparent ratification of Campbell's conduct; (4) Byron Campbell's motive and intent to discriminate against Mrs. Hardin on the basis of her gender; (5) Byron Campbell's motive and intent to retaliate against Mrs. Hardin for her refusal to publicly vindicate him of these complaints; (6) Defendant City's motive and intent to discriminate and retaliate against Mrs. Hardin; (7) Mrs. Hardin's state of mind; (8) Byron Campbell's state of mind; and (9) for the demonstration required for an award of punitive damages. It is for these reasons that the evidence will be offered. Therefore, defendants' motions in limine to exclude this evidence is not well-founded.

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[1] *See* Exhibit A attached hereto.

II. ARGUMENT

* * * *

A. Campbell's Motion In Limine No. 11

In this Motion, Campbell seeks to preclude use of the term "fake letters" absent a proper foundational showing *outside* the presence of the jury. Once again, Campbell seeks to limit not only Mrs. Hardin's evidence but her language as well. Mrs. Hardin will present evidence at trial suggesting that Campbell orchestrated a hostile letter writing campaign against her. She will demonstrate that letters critical of her received by the press and by City Councilmembers contained false authors' names. She will also demonstrate that Campbell solicited such letters from his friends and associates. Mrs. Hardin alleges that this was part of Campbell's retaliation directed at her for her refusal to vindicate Campbell of the charges against him.

By his motion, Campbell attempts to usurp the jury's role in determining this issue based on the evidence presented. Furthermore, as Exhibit F demonstrates, Peter Glaessner, Campbell's attorney used the term "fake letters" in his questioning of Pat MacDonald, Rita Hardin, Mark DeSaulnier, Lloyd Mashore, Colleen Coll, Steve Jepsen, and Jean Underwood, and permitted similar questions without objections. Accordingly, Campbell has waived any objection to the form of these questions and the motion should be denied.

B. Campbell's Motion In Limine No. 12

By this Motion Campbell seeks to preclude use of the terms "hostile or negative letter writing campaign." This motion is nothing more than an extension of Campbell's Motion No. 11 and reflects a similar attempt to not only preclude Mrs. Hardin's introduction of evidence but to limit her language in talking about such evidence.

Mrs. Hardin will introduce evidence at trial that demonstrates that there was a concerted and coordinated effort to discredit her in the local newspapers through letters critical about her directed to the editor. She will also introduce evidence of Byron Campbell's connection to this campaign. Finally, she will offer this evidence as part of Campbell's ongoing retaliation against her for her refusal to publicly vindicate Campbell of the charges against him.

As in Campbell's Motion No. 11, Campbell attempts to usurp the role of the jury in determining issues of credibility, weighing circumstantial evidence, and reaching conclusions. Accordingly, Campbell's Motion No. 12 should be denied.

* * * *

III. CONCLUSION

For the reasons stated above, Mrs. Hardin respectfully requests that the Court deny Campbell's Motions In Limine Nos. 2-5, 11, 12, and 18, and the City of Concord's Motion In Limine No. 8.

Dated: September 9, 1994

LINDA E. SHOSTAK
LAURA V. BEST
SANDRA D. PETERSON
MORRISON & FOERSTER

By: /s/
SANDRA D. PETERSON
Attorneys for Plaintiff
RITA ELLEN HARDIN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant.	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S (ELEVENTH) MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "FAKE LETTERS", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Date: September 22, 1994 Time:2:00 p.m. Location: Courtroom D Judge: Honorable William H. Orrick

Defendant City hereby joins in the (Eleventh) In Limine Motion to Preclude Use of the Term "Fake Letters", or Synonymous Terminology Absent a Proper Foundational Showing outside the Presence of the Jury filed by Defendant Campbell in this matter. Defendant City adopts by reference

all pleadings and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: September 9, 1994 Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
NANCY J. CLARK
KATHRYN J. BURKE
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, Defendant.	Case No. C 93 1297 WHO DEFENDANT CITY'S NOTICE OF JOINING IN DEFENDANT CAMPBELL'S (TWELFTH) MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY
CITY OF CONCORD, Cross-Claimant, v. BYRON CAMPBELL, Cross-Defendant.	Date: September 22, 1994 Time:2:00 p.m. Location: Courtroom D Judge: Honorable William H. Orrick

Defendant City hereby joins in the (Twelfth) In Limine Motion to Preclude the Use of the Terms "Hostile or Negative Letter Writing Campaign", or Synonymous Termi-

nology Absent a Proper Foundational Showing outside the Presence of the Jury filed by Defendant Campbell in this matter. Defendant City adopts by reference all pleadings and draft orders filed by Defendant Campbell in connection with such Motion.

Dated: September 9, 1994

Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

By: /s/
RICHARD S. WHITMORE
NANCY J. CLARK
KATHRYN J. BURKE
Attorneys for Defendant
CITY OF CONCORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	CASE NO: C-93-1297 WHO MOTION IN LIMINE TO PRECLUDE USE OF THE TERM "FAKE LETTERS", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY No. 11 Pre-trial Conference: September 22, 1994 Trial Date: October 3, 1994
AND RELATED CROSS-ACTIONS	

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Defendant Byron Campbell (Campbell) hereby moves the Court, in limine, for an order prohibiting any party, witness or attorney from referring to any letter(s) to the editor appearing in local newspapers as "fake" (or using synonymous words) without first making a proper foundational showing outside the jury's presence that Defendant Campbell wrote the letter or personally solicited the person whose name appears as the author to sign the letter(s).

The basis for this motion is that describing such letters as "fake" (or synonymous words] lacks a proper foundation, assumes facts not in evidence, is completely argumentative and inflammatory in the context of this trial, and would result in substantial, undue prejudice to the defendant. This motion is made under Federal Rule of Evidence (FRE) 104, 401, 402, 403, 602, 801 and 802.

ARGUMENT

A. PLAINTIFF'S TESTIMONY ON THIS SUBJECT MUST BE PROHIBITED BECAUSE SHE LACKS PERSONAL KNOWLEDGE THAT ANY LETTER IS FAKE.

Throughout the course of discovery in this lawsuit, Mrs. Hardin and her counsel have engaged in a calculated attempt to characterize a series of letters which appeared in local newspapers critical of her as "fake" letters. Plaintiff herself testified in her deposition that she believed several letters were "fakes" and had notated a chart referring to several letters as "fakes." She speculates that Mr. Campbell either wrote such letters or solicited others to write such letters. See Ex. A, Hardin deposition excerpt, filed under seal pursuant to confidentiality agreement. Her testimony is not based upon any personal knowledge (Hardin Deposition 457:7-9) but rather through discussions with other employees who purportedly told her that persons whose names appeared with the letters did not write several of them. Plaintiff herself lacks the required personal knowledge to testify on the subject, and her testimony must therefore be excluded. FRE 602, 801, 802.

B. THE TESTIMONY OF ANY OTHER WITNESSES REGARDING PURPORTED "FAKE" LETTERS MUST BE PRECLUDED ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY.

Plaintiff may nevertheless attempt to suggest through other witnesses that letters were "fakes" based upon her deposition testimony.[1] The court must likewise prohibit such testimony, interrogation of witnesses, comment or argument in the jury's presence absent a proper foundational showing of the basis for this factual assertion under FRE 104. These allegations are spurious and, if necessary, will be refuted at trial through the testimony of the various persons who actually wrote these letters; however, that puts the cart before the horse. Plaintiff's witnesses should not be permitted to testify or refer to such letters as "fakes" at all because they, too, lack the personal knowledge to make such an assertion. Her counsel should not be permitted to question witnesses implying that factual assertion, without first making the required factual showing through admissible evidence (and outside the presence of the jury) that any of the subject letters were, in fact, prepared or signed by persons who did not write those letters. (*See Skogan v. Dow Chemical* Co., 375 F.2d 692, 704 (CA Minn 1967): "Questions propounded to witnesses are objectionable if they are argumentative, misleading or assume facts not in evidence.")

Defendant Campbell submits that by requiring this foundational showing to be made that this will properly place the burden of proof where it belongs. FRE 301.

Plaintiff made this allegation that Defendant Campbell sponsored a "fake" letter writing campaign in the complaint (Paragraph 21) and must now be required to prove it through admissible evidence, not argument and speculation. (It

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[1]She identified three persons - Robert Bradshaw, Steve Jepsen and Dan Siri as possible witnesses on this subject. (Ex. A, p. 472.)

should be noted that Defendant Campbell attempted to resolve this issue short of trial at the close of discovery by propounding requests for admission as to 100 of the letters. Plaintiff refused to admit that Defendant Campbell did not write, sign or solicit each of the 100 letters attached to the requests for admission.) The issue here is also one of trial efficiency as well. Plaintiff should not be permitted to make broad, generalized assertions that there were "fake" letters published. She should be required to come forward with admissible evidence as to a specific letter or letters which she hopes to prove were "fakes", if any exist. The defendant should not be put to the task of calling some or all of the letter writers to refute a broad, generalized allegation that Defendant Campbell wrote, signed or personally solicited the writing of critical letters.

CONCLUSION

Defendant Campbell respectfully requests the Court to order in limine that Mrs. Hardin not be permitted to testify about "fake" letters to the editor (or use synonymous terminology) on the basis that she has no personal knowledge on the subject. Further, Defendant Campbell requests that the court order counsel not interrogate any witness, comment upon or refer in the presence of the jury to "fake" letters (or use synonymous terminology) without first laying a proper foundation establishing that as to a specific letter that it was not written or signed by the person whose name appears on the letter, and that such foundational

showing be made only through admissible evidence and outside the presence of the jury.

DATED: September 6, 1994

HARDIN, COOK, LOPER, ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RITA ELLEN HARDIN, Plaintiff, v. CITY OF CONCORD, et al., Defendants.	CASE NO: C-93-1297 WHO MOTION IN LIMINE TO PRECLUDE THE USE OF THE TERMS "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN", OR SYNONYMOUS TERMINOLOGY ABSENT A PROPER FOUNDATIONAL SHOWING OUTSIDE THE PRESENCE OF THE JURY No. 12 Pre-trial Conference: September 22, 1994 Trial Date: October 3, 1994
AND RELATED CROSS-ACTIONS	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant Byron Campbell [Campbell) hereby moves the Court, in limine, for an order prohibiting any party, witness or attorneys from using the terminology "hostile or negative letter writing campaign" during the course of trial, including interrogation of any witness, the testimony by any witness, or commenting or using such terminology in the presence of the jury absent a proper foundational showing outside the presence of the jury establishing that Defendant Campbell wrote letters signing the name of someone else,

wrote letters for other persons to sign, or personally solicited persons to write a specific, critical letter(s).

The basis for this motion is that use of the terminology lacks foundation, assumes a fact not in evidence, is completely argumentative and conclusory. The use of such terminology, or synonymous words, during jury selection, argument, or during examination of the witnesses by counsel would be unduly prejudicial, confuse and mislead the jury, and should be prohibited under Federal Rules of Evidence 104, 401, 402, 403, and 602.

ARGUMENT

A. THE TERM "HOSTILE OR NEGATIVE LETTER WRITING CAMPAIGN" LACKS FOUNDATION, ASSUMES FACTS NOT IN EVIDENCE, IS ARGUMENTATIVE, AND IS PREJUDICIAL TO DEFENDANT CAMPBELL.

Plaintiff alleges that Defendant Campbell "organized and participated in a campaign to discredit (her) . . . specifically, beginning in or about January, 1992, defendant Campbell solicited persons to write letters to the newspapers designed to discredit plaintiff and to damage her reputation as city manager." (Complaint, Para. 21(d).) There-has been no admissible evidence to support this allegation in discovery but, 'throughout the course of discovery, Rita Hardin's counsel has repeatedly interrogated witnesses (despite defense objections] about the existence of a "hostile letter writing campaign", implying that Defendant Campbell instigated or encouraged such a "campaign." (*See*, *e.g.*, Ex. A—Deposition testimony of Jared Zwickey Colleen Coll, Lloyd Mashore, Nancy Gore and Mark DeSaulnier all filed under seal pursuant to confidentiality agreement.)

It is improper to frame a question to imply a factual assertion which is absent from the evidence and patently argumentative. Plaintiff's attorney has repeatedly done this in depositions by asking questions similar in form to: "Did you investigate Ms. Hardin's belief in a hostile letter writing

campaign orchestrated by Mr. Campbell?", or some similarly-worded question.

Plaintiff's counsel has repeatedly described Defendant Campbell as being engaged in promoting a "campaign" of "hostile" or "negative" letters about Rita Hardin during 1992. The word "campaign" refers to a connected series of operations designed to bring about a particular result (Webster's Ninth New Collegiate Dictionary (1988)). Plaintiff obviously seeks to imply that Defendant Campbell was at the root of this "campaign". Use of the word "campaign" here improperly presumes or implies a concerted effort either to write letters for others to sign or, alternatively to personally solicit people to write letters that they would not have written of their own volition, or in the normal exercise of their First Amendment rights. Without any proper foundational showing that Mr. Campbell somehow wrote and signed letters using someone else's name, or wrote letters for other persons to sign or, solicited other persons to write letters to the editor critical of Rita Hardin or her job performance, the use of the term "campaign" both assumes facts not in evidence, is grossly argumentative, and highly prejudicial.

There is a similar problem with use of the words "negative" or "hostile" as adjectives to preface the words "letter writing". Those words, by themselves, are argumentative, conclusory and imply that the letters were written with some type of personal malice somehow emanating from the defendant. The mere fact that letters appeared in the newspaper critical of Ms. Hardin (just as letters appeared critical of Mr. Campbell, urging his resignation) is not by itself a proper foundational showing justifying the use of the hyperbolic label of a "negative" or "hostile" letter writing campaign" before the jury. The mere fact that some of the persons who wrote letters contributed to Defendant Campbell's political campaigns or knew him on a personal level is also wholly insufficient to show that there was a "hostile letter writing campaign". Even if it were established that letters may have been written by persons then signed by

someone else, that is of no relevance to this case unless it is first established as a foundational fact that *Defendant Campbell* was personally involved in those activities.

Plaintiff should not, on the basis of speculation and conjecture, be permitted to inflame the jury with unduly prejudicial questions about a "hostile letter writing campaign" absent a proper foundational showing prior to the subject being brought up in the jury's presence to avoid the obvious prejudice to the defendant. FRE 104. The court should therefore prohibit counsel from interrogating any witnesses, commenting or referring in the jury's presence to any "negative or hostile letter writing campaign" absent a proper foundational showing outside the presence of the jury.

DATED: September 6, 1994

HARDIN, COOK, LOPER,
ENGEL & BERGEZ

By /s/
PETER O. GLAESSNER

PERTINENT STATUTES AND REGULATIONS

2 U.S.C. § 1202. Discriminatory Practices Prohibited

(a) Practices.

All personnel actions affecting the Presidential appointees described in section 1219 of this title or the State employees described in section 1220 of this title shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of Title 42;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of Title 42.

(b) Remedies.

The remedies referred to in section 1219(a)(1) and 1220(a) of this title—

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5k, and 2000e-16(d) of Title 42, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of Title 42;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of Title 29; and

(3) may not include punitive damages.

(Pub. L. 102-166, Title III, § 302, Nov. 21, 1991, 105 Stat. 1088; Pub. L. 104-1, Title V, § 504(a)(1), Jan. 23, 1995, 109 Stat. 40.)

2 U.S.C. §1220:

Coverage of previously exempt State employees

(a) Application.

The rights, protections, and remedies provided pursuant to section 1202 of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policy-making level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by administrative action

(1) In general.

Any individual referred to in subsection (a) of this section may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State and local authorities.

(A) Application.

Section 2000e-5(d) of Title 42 shall apply with respect to any proceeding under this section.

(B) Definition.

For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) Judicial review.

Any party aggrieved by a final order under subsection (b) of this section may obtain a review of such order

under chapter 158 of Title 28. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of Title 28.

(d) Standard of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) of this section if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. §630:

Definitions.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

42 U.S.C. §2000e:
Definitions.
For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e-5:
Enforcement provisions.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

* * * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of

the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Cal. Gov't Code §34851:

Method of adoption of city manager ordinance.

An ordinance establishing a city manager form of government may be:

(a) Enacted by the legislative body; or

(b) Submitted to the electors by the legislative body at any municipal or special election; or

(c) Submitted by the people as an initiative measure.

Cal. Gov't Code §34856:

Power to dismiss and appoint other officers and employees.

The city manager may appoint and dismiss the chief of police and other subordinate appointive officers and employees except the city attorney. When the offices of city clerk and city treasurer are made appointive, appointments to such offices shall be made by the city council unless the city council vests such appointing power in the city manager by ordinance.

Cal. Gov't Code §36501:
Governing officers and employees.

The government of a general law city is vested in:

(a) A city council of five members.
(b) A city clerk.
(c) A city treasurer.
(d) A chief of police.
(e) A fire chief.
(f) Such subordinate officers or employees as are provided for by law.

Cal. Gov't Code §36506:
Appointive officers and employees; compensation; term.

By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees. Such officers and employees hold office during the pleasure of the city council.

Concord Municipal Code:
Article II, Chapter 2, §2206. Office of City Manager.

A. A City Manager shall be appointed by the City Council solely on the basis of an objective evaluation of his administrative qualifications; he need not be a resident of the City of Concord at the time of his appointment, and he shall hold office at the pleasure of the City Council. No person elected or appointed to membership on the City Council shall, subsequent to such election or appointment, be eligible for appointment as City Manager until one (1) year has elapsed following the expiration of the last term for which he was elected or appointed. (Ords. 227, 687)

B. In the event of an intended removal from office by the City Council, the City Manager shall be furnished with a written notice stating the Council's intention to remove him and the reason therefor at least thirty (30) days prior to the effective date of his removal. Within seven (7) days after the delivery to him of such notice, the City Manager, by written notification to the City Clerk, may

request a public hearing before the Council The Council shall then determine the time and date for such a hearing, which shall occur before the thirty (30) day period and at which time the City Manager shall appear and be heard. Subsequent to furnishing the City Manager with notice of intent, the Council may suspend him from duty without loss of salary until such time as his removal has been accomplished by resolution subsequent to the public hearing. The Council, in removing the Manager, shall exercise its uncontrolled discretion, its action shall be final and shall not be predicated upon any particular showing or degree of proof at the public hearing, the sole purpose of which is to allow the City Manager to present publicly his basis of opposition to his removal.

C. If required by the City Council, City Manager shall furnish a surety bond in such sum as the Council may determine. (Ord. 227)

§2207. General Authority of City Manager. Except for the purpose of inquiry, the City Council and its member shall deal with the administrative service solely through the City Manager, and neither the City Council nor any member thereof shall give orders to any of the subordinates of the City Manager. (Ord. 227)

§2208. Duties of City Manager. The City Manager shall be the administrative head of the City Government under the direction and control of the Council, except as otherwise provided for by ordinance. He shall be responsible to the City Council for the efficient administration of the affairs of the City which are under his control. In addition to the City Manager's general powers as administrative head, and not as a limitation thereon, he shall have the following duties:

(A) To see that all laws and ordinances are duly enforced; (Ord. 227)

(B) To employ, discipline, or remove all heads of departments and all subordinate officers and employees of

the City, to transfer employees from one department to another, and to consolidate or combine offices, designate departments and department head titles, and positions under his/her jurisdiction, with the approval of the City Council in each instance; however, nothing herein contained shall apply to the City Clerk, City Treasurer, or City Attorney; provided further the authority given the City Manager under the terms of this paragraph shall be subject to any Civil Service or Personnel System now or hereafter established by ordinance; (Ords. 227, 94-5)

(C) To exercise control over all departments and divisions of the City Government and overall appointive officers and employees thereof subject to the approval of the City Council; (Ord. 227)

(D) To attend all meetings of the Council, except when his removal is under consideration, unless excused therefrom by the Council; (Ord. 227)

(E) To recommend to the Council such measures and ordinances as he deems necessary or proper; (Ord. 227)

(F) To serve as Purchasing Officer of the City and have the responsibility as such to make all purchases. The City Manager may delegate the duties of Purchasing Officer to other city employees; (Ords. 227, 687, 1001)

(G) To serve as Personnel Director under the Personnel Merit System in the absence of the Personnel Director or, if both the City Manager and Personnel Director are absent, the City Manager may delegate the functions of the Director to a city employee; (Ords. 763, 813)

(H) To approve all warrants drawn upon the City Treasury before they are presented to the City Council; (Ords. 227, 687)

(I) To serve as Director of Civil Defense; (Ords. 227, 687)

(J) To consolidate departmental budget requests and prepare budgets for Council review and adoption; to be responsible for administration of the government of the City; (Ords. 227, 687)

(K) To investigate all complaints in relation to all matters concerning the administration of the government of the City; (Ords. 227, 687)

(L) To investigate all complaints made to the City with regard to services maintained by public utilities in the City, to ensure that the provisions of franchises, permits, privileges, and contracts granted by the City are faithfully observed; (Ords. 227, 687)

(M) To perform such other duties as may from time to time be delegated to him by the Council; (Ords. 227, 687)

(N) To prepare and recommend to the City Council a salary plan for appointive department heads; (Ord. 763)

(O) To prepare and submit to the City Council an organization chart showing the organizational plan for all departments of the City Government; (Ord. 227)

(P) To devote his entire time to the duties and interests of the City. (Ord. 227)

§11205. Adoption of Rules, Regulations, Policies and Procedures Relating to Personnel Matters.

(a) The Personnel Rules shall be permanent in nature and contain the procedures for putting into effect, expand, explain, and carry out those provisions of the merit system relating to, but not limited to, the civil service status of employees including the classification, recruitment, examination, certification, appointment, promotion, demotion, transfer, performance evaluation, discipline, layoff, and termination of employees, and their right to be heard in their own behalf through grievance and appeal processes.

§11304. Exempt Service.

(a) The following are to be assigned to the Exempt Service:

(1) Elective offices

(1.1) City Clerk

(1.2) City Treasurer

(2) Appointive Positions

(2.1) City Manager, Assistant City Manager, and their secretaries

(2.2) City Attorney, his deputy, and Assistant City Attorney

(2.3) All Heads of Departments except the Chief of Police

(2.4) Deputy City Clerk and Deputy City Treasurer

(2.5) Receptionist Clerk

(2.6) Construction Inspectors (These positions shall be placed in the competitive service at such time as the present incumbents qualify for probationary appointment by competitive examination, or when the position next becomes vacant.)

(3) Special Positions

(3.1) Members of appointive boards, commissions and committees.

(3.2) Persons engaged under contract to supply expert, professional, or technical services for a definite period of time.

(3.3) Voluntary personnel who receive no regular compensation from the City.

(b) The provisions of this Chapter, Personnel Rules, personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters shall apply to all offices, employments and positions in the service of the City except those in the Exempt Service. However, the provisions of this Chapter, personnel Policy and Procedure Statements, or any Council resolution dealing with personnel matters pertaining to hours of work, overtime, vacations, sick leave, and holidays shall apply to all fulltime exempt positions, except for those in Special Positions. Further, that those appointed to fulltime exempt positions may participate in promotional examinations as provided by the Personnel Rules if the recruitment standards of the class are met. Also,

the provisions of Section 11311 shall apply to all but elective offices.

§11306. Competitive Service.

All positions other than those assigned to the Exempt Service or Limited Service are to be regular positions and assigned to the Competitive Service.

§11307. Appointments.

(a) Appointments to vacant positions in the Competitive Service shall be based on merit and fitness to be ascertained so far as practicable by competitive examination. Appointments shall be made by the Council, the City Manager, or by the officer in whom the power to make appointments is vested by this Chapter or by law.

(b) When appointment is to be made to a vacancy in the Competitive Service, the names of eligible persons willing to accept appointment shall be transmitted by the Personnel Director to the appointing authority in the order in which they appear on the lists and as provided in the Personnel Rules.

(c) The appointing authority for positions in the Competitive Service shall be the head of the department in which the position exists. Such appointments shall be subject to approval by the City Manager.

(d) In the absence of appropriate employment lists for a position in the Competitive Service, a provisional appointment may be made by the appointing power of a person meeting the qualifications for employment for the position. An employment list shall be established within six (6) months for any regular position filled by provisional appointment. No person shall be employed by the City under provisional appointment for a total of more than six months within any fiscal or calendar year (except that the Personnel Director may, with approval of the Personnel Board, extend the period of any provisional appointment not to exceed an additional six (6) months.) No special credit

shall be allowed in any examination or the establishment of any employment or promotional lists for service rendered under a provisional appointment.

(e) Limited Service appointments to temporary, part-time, student-trainee, and seasonal positions may, but need not, be made from eligible lists and those appointed shall not be in the Competitive Service. Appointments of this type shall include short-term employment for the replacement of employees on leave of absence or vacation, to meet work load peaks or emergencies, or for student-trainees or for work seasonal in nature.

(f) During the period of suspension of any employee, or pending final action or proceedings to review the suspension, demotion or dismissal of an employee, the vacancy created may be filled by the appointing authority only by temporary appointment.

(g) Any employee in the Competitive Service promoted, demoted, or transferred to a position not included in the Competitive Service shall return to the position and status from which he was promoted, demoted, or transferred upon removal from the exempt position unless he is dismissed for cause.

(h) The Council, City Manager, or any other officer in whom the power to make appointments is vested shall, within his jurisdiction, also have the power to make transfers, promotions, demotions, re-employments, reinstatements, layoffs, and to suspend or dismiss employees, and shall retain such powers subject to the provisions of this Chapter and the Personnel Rules.

§11308. Examinations.

(a) All applicants for positions in the Competitive Service shall be subject to an appraisal of their qualifications as provided in the Personnel Rules.

(b) Examinations may be specified by the Personnel Director as promotional only, as open only, or as both open and promotional. It shall be the policy of the Personnel

Director and the Personnel Board to encourage the general practice of promotion within the City service whenever in their view a sufficient number of fully qualified candidates are available and such policy will continue to contribute to a sound and efficiently operating City organization.

§11309. Probationary Period.

The probationary period is to be considered and used as continuation of the examination and selection process.

(a) All original and promotional appointments shall be for a designated probationary period of not less than six months nor more than two years as provided in the Personnel Rules concerning the class. During the probation period the employee may be rejected by the appointing authority at any time without right of appeal or hearing.

(b) An employee rejected during the probationary period from a position to which he has been promoted shall return to the position and status from which he was promoted, unless the reason for rejection would have been sufficient to cause his dismissal from his former position as well. In such case, the employee shall be entitled to appeal his dismissal as provided in this Chapter.

(c) An employee's status shall be considered permanent upon completion of the probationary period only if the appointing authority reports to the Personnel Director prior to the end of the designated probation period that the services of the employee have been satisfactory and that the employee is recommended for a permanent appointment. Otherwise, the Personnel Director is to initiate procedures to have the probationary employee released from his probationary appointment prior to the end of its term. Once an employee satisfactorily completes a probationary appointment and thus attains permanent status in a class, this status is retained until status is acquired in another class or until employment is terminated as provided in this Chapter and the Personnel Rules.

Supreme Court, U.S.
FILED
APR 9 1999
CLERK

No. 98-1438

In The

Supreme Court of the United States

October Term, 1998

THE CITY OF CONCORD,

Petitioner,

v.

NEIL S. HARDIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals abuse its discretion in declining to consider two of Petitioner's arguments on appeal that were not properly raised in the district court?

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STATEMENT OF THE CASE

Petitioner City of Concord ("City") complains the Ninth Circuit abused its discretion in deciding that the City had not properly raised in the district court two issues that the City raised on appeal. The City does not and cannot claim the Ninth Circuit's unpublished memorandum decision conflicts with the decision of any other court of appeals. It does not and cannot claim that the issue is important enough to merit the Court's attention. It simply seeks relief from its own errors.

A. The Petition Misstates the Ample Evidence of Sexual Harassment and Retaliation

Plaintiff below Rita Hardin ("Hardin")[1] asserted claims under the California Fair Employment and Housing Act (Cal Gov't Code §§ 12900 *et seq.*) ("FEHA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and California common law for sexual harassment, retaliation and wrongful constructive discharge by her employer, the City, and its former Mayor, Byron Campbell ("Campbell").

In an attempt to portray the jury verdict as based on supposedly inadmissible evidence, the City omits the overwhelming evidence that (i) Campbell sexually harassed Hardin, (ii) the City failed to take appropriate corrective action, and (iii) both Campbell and the City retaliated against her for opposing sexual harassment.

---

[1] Rita Hardin died while the case was on appeal. Her widower, Neil Hardin, substituted as the Plaintiff and is Respondent here.

The facts that support the verdict but which were omitted from the Petition are as follows:

After a career in local government, Hardin in June 1990 became Concord's first female city manager. (SER 2077-81.) The day Hardin became city manager she was told by a colleague "welcome to the city manager's wing; your mayor has his hands all over the women." (SER 2088.) Hardin soon learned through personal experience and observation that this statement was accurate.

Because Campbell spent ten to eighteen hours a day, 365 days a year, in the mayor's office in city hall (SER 1915, 2045-46), he had ample opportunity to harass Hardin and other women employees. From the beginning, Campbell put his arm on Hardin's shoulder and waist as they walked. (SER 1862-63, 2093-94.) On one of the occasions Campbell had his arm around Hardin's waist, he slid his hand up under Hardin's breast and pushed his fingers into her breast. (SER 2110-11.) Campbell would also rest his hand on her thigh while she was driving him to official meetings. (SER 2111-13.) When Hardin would ask him to remove his hand, sometimes he complied, sometimes he did not. (SER 2113.)

Hardin observed Campbell leering at and touching other women employees. She soon learned of numerous other complaints against him by other female employees. (SER 1802-09, 1819, 1823, 1848-51, 1861, 2089-94, 2118-23, 2155-57, 2384-86.)

Hardin realized that she had to counsel Campbell about sexual harassment. (SER 2097.) She and the personnel director warned Campbell that his conduct towards female employees was unwelcome, and, if not curbed

(SER 1988-2008, 2094-2101), might lead to problems for him and the City. Campbell pressed for the names of the complainants and asked that there be no written record of the meeting. (SER 2098, 2100.)

Shortly thereafter, Campbell called Hardin into his office late one evening, closed the door, backed her up against the wall, and "exploded." (SER 2105.) Claiming that his political career would be ruined and demanding the names of the complainants, he told Hardin, "I got you this job; I will take it away from you." (SER 2106.) Campbell demanded Hardin fire the personnel director. (SER 2108.) Campbell also concluded that Hardin should be fired. (SER 2055A-55B.) Campbell later told Hardin to forget this meeting had ever occurred. (SER 2784.)

Campbell instructed Hardin about what he wanted her to do to quell the "rumors" of harassment:

- Fire or fine employees who talked about him or spread "rumors" of sexual harassment (SER 2114);
- Develop a "vindication" plan (SER 2115-16, 2150);
- Form a committee, headed by his wife, to interview and discipline employees (SER 2116);
- Hire an attorney to sue employees he suspected of spreading rumors (SER 2117);
- Ready a press release saying that Campbell had been warned that there were "unfounded" rumors of sexual harassment circulating, but the City had investigated and confirmed there was no truth to them (SER 2131-32).

When Hardin declined to vindicate him, Campbell asked a subordinate employee to take responsibility for the vindication plan. (SER 2281.)

Because Hardin refused to vindicate him (SER 2132-36, 2350-51), he retaliated against her in many ways. (SER 2136-37; ER 1592-94.) In 1991, Hardin sought a modest salary raise. (SER 2142-47, 2372-83.) Knowing the other councilmembers were split, Campbell told Hardin he would support a raise if she went out of town with him to develop a vindication plan. (SER 2004-05, 2149-50.) When she refused, he voted against the salary raise, which was defeated. (SER 1977.) Hardin told other councilmembers of Campbell's proposed pact, but they did nothing.[2] (SER 1975-84, 2008-09, 2153-54.)

In the winter of 1991, a formal harassment charge against Campbell was filed by a college intern. (ER 974, 1002, 1014-15.) During a lengthy investigation, the City's counsel interviewed dozens of witnesses, including Hardin and thereafter released a report concluding Campbell had indeed harassed women employees. Campbell went on television, angrily denied harassing anyone, and claimed that he had been railroaded. He called Hardin the "instigator" and placed the blame for his problems "at Hardin's doorstep." (SER 1824-25, 2049-2055E).

Afraid to meet with Campbell alone, Hardin designated her deputy to conduct the weekly briefings with

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[2] He later told her she would "make out like a bandit" if she would tell the other councilmembers that her belief Campbell had tried to bribe her was a misunderstanding. (SER 2154A.)

Campbell in her place. (SER 2158-64.) The City criticized her for not meeting with Campbell herself and instructed Hardin to resume direct meetings with him. (SER 2165.)

After the release of the sexual harassment report, a deluge of negative letters about Hardin appeared in the press (ER 422A-E). The circumstantial evidence was overwhelming that Campbell was behind them. (*Id.*; SER 2010, 2020-21, 2171-72, 2226-29.) Hardin asked the City to let her respond to the letters. (SER 2174-75.) The councilmembers refused. (SER 2170, 2176, 2395.) They ignored her request to hire a lawyer to speak to Campbell's lawyer about a cease-fire. (SER 2179-81, 2276-78.) Instead, the councilmembers told her that their opinions of her work were negatively impacted by these letters and her future success depended on her ability to accommodate and get along with Campbell. (SER 2041-43, 2182-83, 2250.)

Ultimately, councilmembers lost patience with Hardin because she continued to insist upon relief from Campbell's relentless retaliation, and they fired her in September 1992 in a dramatic closed meeting which one councilmember described as the "ugliest" event of *her* life.

Hardin was unable to find a job as a city manager again until May 1995, when she took a position in a small community in Southern California at a much lower salary. (SER 2217.)

B. The Petition Misstates the Proceedings Below Related to the City's Failure to Preserve the Argument Hardin Was Exempt from Title VII

Hardin's Complaint against the City and Campbell, filed in April 1993, stated claims under California's FEHA, Title VII and under California common law. The City answered, but it did not move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction.

Shortly before trial, the City filed a motion for summary judgment arguing, among other things, that Hardin was a policymaker not covered by its civil service system and was therefore not protected by Title VII pursuant to 42 U.S.C. § 2000e(f). It did *not* argue, as it now does, that the policymaker exclusion presented a pure legal issue which had to be decided based solely on state or local statutes or ordinances. To the contrary, it told the court that the "determination as to whether a public employee is exempt as an appointee on the policymaking level is a *factual* inquiry to be based upon the *facts* and *circumstances* of the employment relationship between the complaining official and the elected officials and the *evidence* presented as to the complaining official's level of authority and scope of duties." (SER 1775; emphasis added.) The City's position was thus exactly opposite of the position it now takes that resolution of the policymaker exclusion can never turn on the facts about the plaintiff's actual job duties. The district court denied the City's summary judgment motion. (*See* App. A43.)

The City now says that the district court entered factual findings pursuant to Federal Rule of Civil Procedure 56(d) and thereafter precluded it from presenting the issue to the jury. (Pet. at 18-19.) This is untrue. The district court made no such findings; it simply denied the motion and ordered that Hardin's "[f]irst cause of action for violation of Title VII and for violation of Hardin's civil rights under FEHA" (App. A44) "remain[s] for trial." (App. A43.)

The City proposed no jury instructions about the policymaker exclusion, and it did not argue the issue to the jury at the first trial. It moved for judgment on Hardin's Title VII claim pursuant to Federal Rule of Civil Procedure 50 based on the trial testimony of a former city manager who testified that he believed the city manager's position was not subject to the civil service laws. The district court denied the motion.

During the second trial, the City offered no evidence, argument or instructions about the policymaker exclusion and it did not object to any testimony related thereto. Nor the did City file a Rule 50 motion for judgment. After the jury rendered its verdict in favor of Hardin on the Title VII, FEHA and constructive discharge claims, the City's motions for a new trial did not argue that Hardin was excluded from the protections of Title VII.

C. The City Did Not Raise First Amendment Objections

Before the first trial, Campbell moved in limine only to prohibit any witness from referring to the letters to the

local newspaper that were critical of Hardin as "fake letters" or "from using the terminology 'hostile or negative letter-writing campaign.' " (ER 343, 355.) Campbell's motions *did not mention the First Amendment*, or seek the exclusion of the letters themselves or testimony about the letters.

At the trial, witnesses testified about the letters, the letter-writing campaign and the City's refusal to help. (ER 562-69.) Neither Campbell nor the City objected to any of this testimony on First Amendment or other grounds.

The only objection that even referred to the First Amendment was made to the admission of one exhibit, which contained all the letters, and it was not the First Amendment claim that the City now argues. (ER 796A-98.)[3] After stating that admitting all of the letters would come "close" to violating the First Amendment, Campbell (not the City) argued that admitting the letters and holding him responsible simply because he associated with their authors – without proof that he had instigated the letters – would violate his First Amendment associational rights. (ER 797-98.)[4] The City never

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[3] The primary objections were foundation, relevance, and the practical problems of a bulk exhibit. (ER 796A.)

[4] Absent some . . . foundational basis that Mr. Campbell . . . wrote . . . or solicited these letters . . . , to let the letters come in under the guise of circumstantial evidence is . . . *starting to get close to infringement* upon First Amendment rights, because later on, if needed, these people will come in and explain what they did, in terms of writing the letters. (ER 797-98; emphasis added.)

asserted that admitting the letters would violate any of *its* First Amendment rights.

The district court sustained the objection to the admission of the letters, *in toto*, but it said it would admit three letters chosen at random. Neither Campbell nor the City objected. Instead, Campbell said since the jury had already heard about the number of letters (*i.e.*, the damage had already been done by testimony that came in without objection), he wanted to testify that he had had nothing to do with them, and that if any letters were introduced, he also wanted to submit testimony from their authors that he had not requested the letters. *Id.*

Rather than admit three letters randomly, the City and Campbell stipulated with Hardin that (i) there were three critical letters before and 67 after December 31, 1991; (ii) the letters' authors would testify that Campbell had not asked them to write the letters; (iii) Campbell denied any involvement in instigating the letter writing campaign; and (iv) the letters could not be introduced nor their authors subpoenaed, but that the parties:

> could examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. (ER 556-58.)

Campbell explained:

> [T]he notion that by association with these people, . . . he somehow could be charged . . . with instigating a hostile letter-writing campaign, . . . violates Mr. Campbell's First Amendment rights . . . and that's the additional concern about a circumstantial evidence case with these letters. (*Id.*)

The City's assertion in the Petition that it entered into this stipulation only because the district court had rejected its attempt to exclude all reference to the letters is a misrepresentation. It never asked the district court to exclude *testimony* about the letters, and the stipulation arose after the district court *sustained* Campbell's objection to the admission of the letters, not after rejecting any First Amendment objection by the City.

The City's insistence on the same stipulation at the second trial – without stating any First Amendment objection (ER 549-69, 570-71, 1721, 1725) – constituted another waiver of any First Amendment objection to that evidence.

REASONS FOR DENYING THE WRIT

The Petition presents no issue meriting the Court's attention: The record belies the City's factual recitation; the Ninth Circuit did not abuse its discretion in rejecting the City's arguments which had not been properly raised below; and no intercircuit conflicts exist for the Court to resolve.

1. The Lower Courts' Decision Not to Find Hardin Excluded from Title VII Does Not Merit Review

a. The Exclusion of Policymakers from Federal Title VII's Protection Does Not Present a Jurisdictional Issue

Title VII excludes from its protection public employees who are appointees on the policymaker level

and who are not subject to civil service laws. 42 U.S.C. § 2000e(f) (1994). The exclusion does not affect subject matter jurisdiction, as this Court explained in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, ___, 118 S. Ct. 1003, ___, 140 L. Ed. 2d 210, 223-224 (1998):

> As we stated in *Bell v. Hood*, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946), "[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." . . . [Jurisdiction exists] unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.*, at 682-683; [additional citations omitted]. Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974) [additional citation omitted].

The Fifth Circuit squarely addressed the policymaker jurisdictional argument in *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) and held that the question whether the Title VII plaintiff was an excluded policymaker does not affect jurisdiction. No intercircuit conflict exists.[5]

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[5] The City's reliance on *Stillians v. Iowa*, 843 F.2d 276, 278 (8th Cir. 1988), *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th

b. The City Waived Its Policymaker Exclusion Argument by Failing to Raise the Issue at the Second Trial

The Ninth Circuit properly declined to review Petitioner's claim of error in the denial of its motions for summary judgment and for judgment as a matter of law at the first trial on an appeal from judgment entered after the second trial. The absence of a Rule 50(b) motion in the district court deprives the appellate court of power to consider appellant's request for judgment as a matter law. The Ninth Circuit (App. A2) correctly relied on *Desrosiers v. Flight Int'l*, 156 F.3d 952, 957 (9th Cir. 1998) (holding appellate court lacks power to consider request for judgment as a matter of law when no Rule 50(b) motion made below); *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (holding denial of summary judgment motion unreviewable after jury has heard the case); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963) (holding that ruling on Rule 50(b) motion at a first trial is unreviewable on appeal from judgment following a second trial).

c. The Verdict Would Stand Even if There Had Been an Error on the Policymaker Issue

The jury found the City liable for sexual harassment and retaliation under *both* California's FEHA and Title

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Cir. 1983), *EEOC v. Reno*, 758 F.2d 581 (11th Cir. 1985) and *Monce v. City of San Diego*, 895 F.2d 560 (9th Cir. 1990) is misplaced because none of the cases addressed subject matter jurisdiction.

VII. (ER 659-62, 666-67.) Thus, the verdict would survive even if the Title VII claim had failed.

d. The Ninth Circuit Did Not Hold that the Policymaker Exclusion Must Always Be Presented to the Jury

Contrary to the City's assertion, the Ninth Circuit did not hold that the policymaker exclusion must always be decided by the jury. Rather, it decided the City waived the issue because, after failing to prevail on summary judgment, the City abandoned the issue by failing to present it to the jury. (App. A2.)

The position that the City takes now – that the applicability of the exclusion must in every case be decided by the court solely by reference to state and local laws – was not only not raised below, it is inconsistent with the City's position below – that coverage depends on the facts and circumstances of the plaintiff's employment. The Ninth Circuit was correct in finding the City waived the policymaker issue. Its decision does not conflict with a decision of any other circuit.[6]

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[6] The City claims *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996); *Stillians v. Iowa*, 843 F.2d 276 (8th Cir. 1988); and *EEOC v. Board of Trustees*, 723 F.2d 509 (6th Cir. 1983) hold the policymaker exclusion must always be decided by the court. This is incorrect. Although the issue was resolved as a matter of law in those particular cases, none of them held the issue must always be decided by the court. Indeed, those courts have in other cases refused to decide the issue as a matter of law. *See e.g., Kolman v. Sheahan*, 31 F.3d 429, 433 (7th Cir. 1994) (reversing dismissal and remanding "so that the facts about the plaintiffs' jobs can be developed in the district court.").

2. The Ninth Circuit Correctly Concluded that the City Waived Any Evidentiary Objections Based on the First Amendment

The City stipulated to almost all of the evidence to which it now belatedly objects. The City waived any such evidentiary objections because they were not made in the district court. The Ninth Circuit's conclusion that no plain error occurred is correct.

CONCLUSION

The Petition should be denied because it is legally frivolous.

Dated: April 9, 1999

Respectfully submitted,

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(H)

No. 98-1438

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THE CITY OF CONCORD,

Petitioner,

v.

NEIL S. HARDIN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I
INTERESTS OF AMICI

A. Identification of Amici.

Amici are thirty seven cities and counties located in the State of California: the City and County of San Francisco, and the Cities of San Diego, Santa Clara, Laguna Beach, Napa, Oceanside, Palm Desert, Alameda, Monterey, Imperial Beach, Town of Tiburon, Merced, Los Altos, Carlsbad, Lafayette, Madera, Antioch, Redlands, Chula Vista, Mountain View, Eureka, Riverside, Avalon, Truckee, Rialto, Hughson, Yreka, El Cajon, Atherton, Gustine, National City, Lakewood, Irwindale, San Jacinto, Delano, Moreno Valley and Walnut Creek.

B. Description of Amici's Form of Government.

Like Appellant City of Concord ("Concord"), Amici have a Council-Manager form of government. In most cases, the mayor is a ceremonial figurehead member of the City Council. The mayor has but one vote on the City Council and does not represent an independent executive branch of government.

C. City Manager is Chief Operating Officer.

Like Concord's City Manger, Amici's city managers are their chief executive officers: they manage the city's business, execute city policy, assist with the formulation of city policy, prepare budgets, manage city personnel, prepare agendas and perform numerous other traditional executive functions. The City Manager is clothed with executive and administrative functions and duties, and is the administrative head of a municipal government. (See Welch v. City of Long Beach, (1952) 109 Cal.App.2d 561, 564, 241 P.2d 26, 28; 3 E. McQuillin, Municipal Corporations, section 12.31 (3d ed. 1990). As the

administrative head of a city, a city manager "must of necessity exercise discretionary powers in the management of city affairs and is not... a mere ministerial figure-head." (Welch v. City of Long Beach, supra, 109 Cal.App.2d at 564, 241 P. 2d at 28). The city manager "is an officer and not an employee, and the position is that of an office, and not an employment." (3 McQuillin, Municipal Corporations, section 12.31 (3d ed 1990).

D. City Managers Serve at Pleasure of Amici's City Councils.

City Managers (and other policy making appointees)[1] serve with no promise of tenure or due process rights. Instead, appointees serve pursuant to a contract that provides for service at the complete and unfettered discretion of the city council. Appointees may be removed from office in the Council's "uncontrolled discretion." (See, e.g., Concord Municipal Code, section 2206A; see also Cal. Gov't. Code, section 36506).

Therefore, appointees are not within the protection of the civil service system. There are no notice or hearing rights. They may be terminated or disciplined at any time, for any reason, or for no reason.

E. Importance of Preserving City Councils' Uncontrolled Discretion Over Appointees.

The unrestrained discretion to hire and fire appointees serves a vital government interest of all Amici: elected officials must be satisfied that their appointees are executing the policy

[1]City Managers and other policymaking appointees shall collectively be referred to as "appointees".

objectives the elected officials seek to implement on behalf of the electorate. This requires a complex weighing of political, policy, budgetary and other considerations that the electorate entrusts to their elected officials. The cumbersome procedures of the civil service would frustrate elected officials' responsiveness and service to the electorate if they were applied to high level political appointees such as city managers. These factors carry obvious implications upon the principle of democratic governance.

For those reasons, Amici must zealously protect their discretion over the hiring and firing of appointees.

F. Amici Grant City Managers the Same Vacation/ Sick Leave Benefits Granted to Civil Service Employees.

Concord grants its City Manger the same vacation and sick leave benefits it grants to its civil service employees. This is a common provision in city manager employment contracts, including many of Amici's.

G. Brief Description of Lower Courts' Title VII Errors and Impact Upon Amici.

The District Court decided that the grant of vacation/sick leave benefits to a city manager made her "subject to the civil service laws"[2] and thus outside Title VII's "Policymaker Exemption" described below. As a result, the District Court found that it had jurisdiction to entertain the City Manager's Title VII claim before a jury.[3] The Ninth Circuit refused to address this issue.

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[2]See 42 U.S. C. section 2000e(f) which exempts from Title VII's coverage "appointees on the policymaking level...not subject to the civil service laws of a State government."

[3]If Title VII's elements for District Court jurisdictions are not met, then jurisdiction for trial rests in the EEOC. (2 U.S.C. sec 1220(b))

"Subject to the civil service laws" was never intended by Congress to include true appointees who happen to participate in vacation and sick leave benefits. This violates the obvious meaning of "subject to the civil service laws." It also frustrates Congress' intent to preserve the sensitive appointee-city council relationship. That intent is found in Congress' providing appointees the limited remedy of EEOC review, not a District Court jury trial. (See I(B) below).

The lower courts' rulings are a tremendous encroachment upon the discretion necessary for the administration of public policy through appointees. Congress was aware of that need for discretion when it crafted Title VII's "Policymaker Exemption". (See I(C) below).

H. Brief Description of Lower Courts' First Amendment Errors and Their Impact Upon Amici.

The lower courts incorrectly favored Title VII in its collision with the First Amendment in this case. Like Concord, Amici and its public officials have a responsibility to criticize their appointees' policy choices and job performance as they see fit. This is part of their watchdog duties over appointees and their responsibilities to their constituents. The District Court's rulings chill such criticism by admitting into evidence, as proof of retaliation, 1) the Mayor's public criticism of the City Manager's policy choices; 2) evidence that the Mayor orchestrated a letter writing campaign critical of the City Manager's policy choices; and 3) Concord's City Council's failure to publicly disagree with the Manager's criticisms and its failure to publicly praise the Manager's job performance.

Such rulings place an ominous chill upon the content of public debate. This is not a hypothetical threat to Amici. The seven figure judgement entered against Concord brings to the

forefront Amici's deep interest in this case. (See II below).

II
ARGUMENTS

THE LOWER COURTS' RULINGS SEVERELY INTERFERE WITH AMICI'S DISCRETIONARY RELATIONSHIP WITH ITS APPOINTEES.

A. Jurisdiction Over Title VII Claims Conferred Upon District Courts.

The Disctrict Courts have jurisdiction over Title VII claims. (See 42 U.S.C. section 2000e-5 (f)(3) (jurisdiction over Title VII claims; see also 28 U.S.C. section 1331 (general federal question jurisdiction); see also 42 U.S.C. section 1981a(c) (granting jury trial to Title VII claimants)).

B. The Policymaker Exemption.

The "Policymaker Exemption" of Title VII (42 USC sec. 2000e(f)) exempts from Title VII certain categories of claimants, including "appointees on the policymaking level…not subject to the civil service laws of a State government." (Id.)

Exempted employees are given remedies for discrimination as determined by a specialized administrative body, the EEOC, rather than the District Courts. (See 2 U.S.C. section 1220(b)). There is a limited right of review in the Courts of Appeal. (See 12 U.S.C. section 1220(c-d)).

C. Purpose of the Policymaker Exemption. The Equal Employment Opportunity Commission has summarized the purpose of the Policymaker Exemption:

The Equal Employment Opportunity Commission has summarized the purpose of the Policymaker Exemption:

> "In exempting policy-making appointees, Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.
>
> Decision No. 79-8, October 20, 1978 [26 F.E.P. Cas.(BNA) 1760].

The clear purpose of the Policymaker Exemption is to give public officials maximum freedom to interact with their appointees within the political arena, and to hire and terminate persons based upon political considerations. The Policymaker Exemption quite clearly reflects Congress' striking the balance in favor of allowing elected officials maximum freedom to interact with their appointees by exempting such appointees from Title VII.[4]

This, of course, does not mean that appointees, such as

[4]That balance resulted from Congress' weighing the benefits of an appointee's jury trial against the impediments that the mere threat of such trials can present to the operation of state and local governments.

city managers, cannot avail themselves of other state and federal remedies for sexual harassment. But it does mean that the only reasonable interpretation of the civil service requirement under the Policymaker Exemption is that Congress did not intend Title VII to apply to persons not subject to the civil service protections involving the hiring, termination and discipline of employees.

The fact that a city makes civil service regulations regarding work hours, vacation and holidays applicable to "exempt" appointees has nothing to do with the purpose of the Policymaker Exemption. To conclude otherwise would unduly hinder politicians from freely interacting with their appointees in the political arena.

D. The District Courts Committed Clear Error When It Concluded That an Appointee's Participation in Vacation and Sick Leave Benefits Renders the Appointee Part of the Civil Service.

The District Court correctly concluded that Hardin was an "appointee at the policymaking level" based upon her "significant policymaking functions as City Manager." App. A36. This meets the first of two prongs for the Policymaking Exemption.

The District Court found that the second prong for the Policymaker Exemption—that the appointee not be subject to the civil service laws—was not met due to Hardin's participation in Concord's vacation and sick leave policies. The Ninth Circuit would not review the issue.[5]

Congress is well aware of the two-tiered employment system used in thousands of municipalities across the nation.

[5]The Ninth Circuit's refusal to review this issue was on the grounds of waiver. Amici join Concord's arguments that this is a non-waivable issue of subject-matter jurisdiction. (Petition for writ of Certiorari, p. 14-15).

Typical of those is Concord's which divides its personnel system into "Competitive" (i.e., tenured positions following a probationary period) and "Exempt" (unprotected) categories. (Concord Mun. Code sec. 11306-11309; 11304).

Congress is also well aware that "Exempt" service does not equate with "uncompensated service". Exempt appointees are typically paid a salary and provided benefits pursuant to contract. Such a compensation package does not make one "subject to the civil service laws" as that phrase is used in Title VII's Policymaker Exemption. The "civil service laws" can only refer to the widely used civil service system which exists: 1) to abolish the so-called "spoils system" that subjected every public employee to the political whims of those elected to office; and 2) to increase the efficiency of the service by assuring the employees of continuation in office regardless of what party may then be in power. (See, e.g., Allen v. McKinley (1941) 18 Cal.2d 697, 705, 117 P. 2d 342, 347). Familiar characteristics of "civil service laws" include termination only for cause following a probationary period, and hiring/ promotion decisions based upon merit.

Congress did not intend Title VII to apply to appointees. Congress intended for appointees to be treated differently. Congressional intent is eviscerated by the District Court's ruling that Concord's providing vaction/sick leave benefits brings an appointee within Title VII's applicaton.

Certainly Congress did not intend to have the delicate balance upset upon a municipality's providing a vacation and sick leave benefits package to its policymaking appointees. Simply put, those benefits do not place one into the civil service.

THE LOWER COURTS' FIRST AMENDMENT RULINGS CHILL PUBLIC CRITICISM OF APPOINTEES THAT HAVE FILED CLAIMS

A. Municipalities Have a Duty to Oversee and, Where Necessary, Criticize Performance of Their Appointees.

Appointees are subject to the supervision and control of their respective municipalities. Those municipalities have a responsibility to the public to oversee, supervise, and where necessary, criticize the performance of appointees. Execution of this responsibility is the "check" upon the appointees' performance.

B. First Amendment Prohibits Civil Liability for Public Debate About Public Figures.

When criticism is leveled against public figures relating to public issues, it is protected speech. The First Amendment precludes civil liability on any theory for public debate about public figures not involving false statements of fact.[6] (Hustler Magazine v. Falwell, 485 U.S. 46, 53, 56 (1988)(emphasis added); New York Times v. Sullivan, 376 U.S. 254 (1964). Debate on matters of public concern rests on the highest rung of First Amendment values. (NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

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[6]No false statements of fact were present here, given the first jury's verdict against Hardin on her defamation claim, which has not been appealed. ER 461, 1709.

C. Lower Courts' Rulings Violate the First Amendment by Imposing Civil Liability for Public Debate About a Public Figure.

The lower courts' rulings pierce this First Amendment bedrock by admitting evidence of alleged retaliation consisting of: 1) Councilman Campbell's public criticism of Hardin's performance; 2) Campbell's alleged encouragement of his political supporters to criticize Hardin's job performance in letters to the editor; and 3) Concord's City Council's failure to publicly disagree with Hardin's criticisms, or its failure to publicly praise Hardin's job performance.

The issues about which Hardin was criticized are quintessential public issues: her use of public funds and her promotion of a police lieutenant.

D. Lower Courts' Rulings Chill Public Criticism and Debate.

The rulings force elected officials to think long and hard about publicly criticizing an appointee's performance, effectively cloaking appointee-claimants with a shield from public scrutiny and criticism. Who dares to publicly criticize an appointee who has filed a discrimination claim? Or one who merely threatens to file a claim? Once again, Amici are placed in a dilemma: shirk their responsibilities of overseeing appointees, or risk exposure by speaking out on public issues.

The lower courts' decisions in this case raises the specter that <u>any</u> criticism of a city manager can potentially lead to a Title VII claim. This obviously hinders council members from operating freely in the political arena to hire, dismiss and criticize appointees. Yet, criticism of a city manager on issues of public concern, while sometimes unpleasant, reflects harsh political realities that come with the position. Indeed, the right to criticize is a cherished right protected by the First Amendment.

As municipalities and cities, Amici occupy a special position: they must level criticism of appointees (and non-appointees) where they believe it is due. The exposure to which the lower courts' rulings place Amici is intolerable to the grand tradition of free speech and to their responsibility to supervise and manage appointees. Due to this dilemma, Amici would greatly benefit from this Court's review of this issue.

There must be no exposure for speaking out on public issues. There must be no exposure from encouraging members of the community to speak out on public issues. There must be no exposure for a city council refusing to support, oppose, or remain neutral on public issues.

Speech relating to public issues must remain protected.

III
CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: April 8, 1999

Respectfully,
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No. 98-1438

In the Supreme Court of the United States

OCTOBER TERM 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In attempting to reduce the questions presented to this Court to whether the Ninth Circuit "abuse[d] its discretion in declining to consider two of Petitioner's arguments," Respondent Hardin pointedly demonstrates the need for this Court's intervention: Whatever the Ninth Circuit may have thought, surely *this* Court would be surprised to learn that the lower federal courts have "discretion" to overlook their own lack of subject matter jurisdiction, or to disregard this Court's repeated holdings that the lack of jurisdiction *cannot* be waived. It is Respondent's success in persuading the Ninth Circuit and the District Court to disregard the limits on their jurisdiction, and on their powers to assess liability for speech and conduct squarely protected by the First Amendment, for which Petitioner seeks remedies here.

Compounding the error, Respondent begins his opposition with the inexplicable misstatement that Petitioner "does not and cannot claim" that the Ninth Circuit's decision "conflicts with the decision of any other court of appeals," or that the issues presented are "important enough to merit the Court's attention." Opp. at 1. Even the most casual reader of the Petition could not mistake that Petitioner *does* so contend; for the reasons set out in the Petition and below, any fair-minded reader of the law and the record must conclude that it *can*.

Specifically, the City's Petition demonstrates a clear circuit split on two distinct questions: (1) Whether Title VII claims brought by individuals who fall within the Policymaker Exclusion (42 U.S.C. §2000e(f)) are outside the subject matter jurisdiction of the federal District Courts; and (2) Whether a Title VII claimant's status as an excluded "Policymaker" (which controls the claimant's right to jury trial) is to be decided as a question of law by the court, or as a question of fact by a jury.

As for the importance of these issues, the Court need not rely on Petitioner's word alone. Thirty-seven California

cities, large and small, have joined in a Brief of Amicus Curiae ("BAC") to emphasize the vital importance of these questions to the conduct of local government throughout the country: These issues affect the balance of power between federal and state government to determine issues of critical importance to the conduct and tenure of state and local policymakers. *See* Petition 20-22; BAC 5-8. They also affect the delicate balance between local officials' First Amendment rights (and duties) to criticize appointed policymakers, and policymakers' rights to be free of discrimination. Petition 28-30; BAC 9-14.

Petitioner will not reiterate here each of the many reasons justifying a grant of certiorari, nor respond to each of Respondent's many factual and legal misstatements.[1] This Reply briefly corrects only the most blatant errors Respondent's opposition fosters.

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[1]For example, Respondent devotes close to half of his brief to the prurient details of the harassment allegedly engaged in by Mayor Byron Campbell, who is not a party to this Petition (and whom the first jury to hear this case found not to have violated the Plaintiff's rights in any respect). However diverting Respondent may wish this recitation to be, it has no relevance to whether Plaintiff's status as an excluded Policymaker deprived the District Court of jurisdiction to present her claims to a federal jury. Nor do the details of the alleged harassment have any bearing on the City's First Amendment defense: Whether Plaintiff was harassed or not, the verdict *must* be reversed if the jury *could have* based the City's liability on protected speech or conduct. *See* Part II, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPLITS IN THE CIRCUITS CONCERNING THE APPLICATION OF TITLE VII'S POLICYMAKER EXCLUSION.

A. There Is A Conflict Among The Circuits Over Whether The Policymaker Exclusion Is Jurisdictional Or Can Be Waived.

Respondent's contention (at 11) that "[n]o intercircuit conflict exists" is simply untrue: The circuits are in fact divided on whether or not the Policymaker Exclusion affects the federal District Courts' subject matter jurisdiction. In *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)—a case that Respondent inexplicably asserts (at 11 n.5), does not "address[] subject matter jurisdiction"—the Eighth Circuit squarely held that it had "no subject matter jurisdiction to hear [plaintiff's] claim" (843 F.2d at 278), because her position "was on a policymaking level and was exempt from Iowa civil service laws." *Id.* at 279.[2] In contrast, Respondent himself contends that *Clark v. Tarrant County*, 798 F.2d 736, 742, 748 (5th Cir. 1986) holds that the plaintiff's status as an excluded policymaker "does not affect jurisdiction." Opp. 11. In addition, both the Ninth Circuit here, and the Seventh Circuit in *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (7th Cir. 1994), held that the Policymaker

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[2]Respondent is equally wrong in asserting (at 11 n.5), that the decisions of the other Courts of Appeals cited in the Petition do not "address subject matter jurisdiction." Each of the following decisions expressly acknowledged that it was reviewing, and affirming, a District Court's dismissal of a Title VII or ADEA case *for lack of subject matter jurisdiction* on the ground that the plaintiff fell within the Policymaker or "personal staff" exclusions: *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990); *EEOC v. Reno*, 758 F.2d 581, 583 & n.6, 585 (11th Cir. 1985); *EEOC v. Board of Trustees*, 723 F.2d 509, 510, 512 (6th Cir. 1983).

Exclusion can be *waived*—thus implicitly determining that the Policymaker Exclusion does *not* affect the District Courts' subject matter jurisdiction, which can never be waived.

Respondent also completely misses the point on the merits when he argues (at 11), that this is just another situation like the one presented in *Bell v. Hood*, 327 U.S. 678 (1946), in which the issue presented is integral to the existence of a valid claim under federal law. Unlike the claim in *Bell*, a plaintiff's status as an excluded Policymaker *does not determine whether or not she states a valid federal claim*: As the Petition explains, under the carefully considered remedial scheme Congress adopted in 1991, the Policymaker Exclusion determines *only whether the claimant's allegations of discrimination will be presented to a federal District Court jury or to the EEOC*. *See* Petition at 5; *compare* 42 U.S.C. §§2000e(f), 2000e-5(f)(3) *with* 2 U.S.C. §§1202, 1220.

Finally, Respondent's unsupported pronouncement that "the verdict would survive even if the Title VII claim had failed" (Opp. 12-13), is incorrect for the simple reason that federal District Courts have no subject matter jurisdiction over the claims of excluded Policymakers. If the District Court never had subject matter jurisdiction over Plaintiff's federal claims, then it had no original jurisdiction at all, and could not exercise supplemental jurisdiction over Plaintiff's state-law claims. 28 U.S.C. §1367; *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 329 (9th Cir. 1996).

B. The Circuits Are Split On Whether The Applicability Of The Policymaker Exclusion Is A Question Of Fact For The Jury Or Of Law For The Court.

Respondent is no more faithful to the record or the holdings of the lower federal courts in contending that there is no split among the Courts of Appeals concerning the role

of the court vis-à-vis the jury in determining whether to apply the Policymaker Exclusion.

With respect to the record, Respondent is flatly wrong in asserting (at 7) that the District Court "made no . . . findings" relevant to Plaintiff's Policymaker status in ruling on the City's summary judgment motion. The record could hardly be more explicit: After a detailed discussion of the responsibilities of Plaintiff's office, the District Court concluded:

> "Because Hardin exercises significant policymaking functions as City Manager, *the Court finds that she was 'an appointee on the policymaking level' under Title VII.*" App. A36 (emphasis added)

The District Court also held that that the Concord Municipal Code was "carefully crafted to include Hardin in portions of the civil service system. . . . Because Hardin is not exempt from the civil service system, she may bring a Title VII claim against the City." App. A38.

Because the District Court made a binding determination that Hardin *was* a policymaker (*see* FED. R. CIV. P. 56(d); Petition 18-19), but found as a legal matter that she was "subject to . . . civil service laws," there was nothing remaining for the City to present to the jury. The City thus cannot have waived this issue by failing to do so. Particularly in the context this record provides, the Ninth Circuit's decision that the City waived the Policymaker Exclusion by not presenting it to the jury must mean that it is *always* a jury question. The Tenth Circuit agrees that this is a factual matter (*Anderson v. City of Albuquerque*, 690 F.2d 796, 800-01 (10th Cir. 1982)), whereas the Sixth, Seventh, and Eighth Circuits make the determination by reference to applicable state or local law. *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983); *Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996); *Stillians*, 843 F.2d at 278-79.

The question presented is an important one: The Ninth Circuit's decision effectively stands Congress' carefully crafted remedial scheme on its head by holding that a jury trial is required to determine whether a claimant has a right to a jury trial.

II.

IMPOSITION OF TITLE VII LIABILITY FOR EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Once again, Respondent misstates both the record and the law in arguing that the Court should not review the important question Petitioner raises concerning the collision of Title VII with the First Amendment.

First, although Respondent spends close to half of his brief describing the prurient details of Mayor Campbell's alleged improprieties, he also concedes that liability was premised to a great degree on activities protected by the First Amendment, including the alleged "negative letter campaign," and the City Council's (constitutionally protected) refusal to respond to it. Opp. 5. Indeed, Respondent's own recitation of the facts makes it clear that the City's purported "retaliation" liability was premised entirely on protected First Amendment activity.

Second, Respondent's contention that "Campbell's motions did not mention the First Amendment" is, once again, simply untrue. *See* App. A92 (Defendants' motion in limine: "Use of the word 'campaign' here improperly presumes or implies a concerted effort either to write letters for others to sign or, alternatively to personally solicit people to write letters that they would not have written of their own volition, or in the normal exercise of their *First Amendment*

rights" (emphasis added)); App. A75 (argument on Defendants' objection: "to let the letters come in under the guise of circumstantial evidence is really, in my judgment, starting to get very close to infringement upon *First Amendment* rights" (emphasis added)).

Finally, it is Respondent who does not and cannot argue that the First Amendment questions raised in this Petition are unimportant. Indeed, thirty-seven California cities have described the dramatic impact of this issue on their responsibilities to their constituents:

> "The rulings force elected officials to think long and hard about publicly criticizing an appointee's performance, effectively cloaking appointee-claimants with a shield from public scrutiny and criticism. Who dares to publicly criticize an appointee who has filed a discrimination claim? Or one who merely threatens to file a claim? Once again, Amici are placed in a dilemma: shirk their responsibilities of overseeing appointees, or risk exposure by speaking out on public issues." (BAC 10)

As this Court has repeatedly emphasized, if there is any likelihood that liability was premised on the exercise of First Amendment rights (either to speak or not to speak), then reversal is required. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924-25 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in the City's Petition and in the Brief of Amicus Curiae, the Court should grant the Petition, and either entertain the important issues raised therein or, alternatively, summarily vacate the Ninth Circuit's decision, and remand with instructions to decide the jurisdictional and First

Amendment issues the Ninth Circuit previously declined to consider.

DATED: April 27, 1999.

Respectfully,

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